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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE STATE OF ARIZONA, ET AL.,
Petitioners,

versus

SAN CARLOS APACHE TRIBE OF ARIZONA AND THE NAVAJO TRIBE OF INDIANS, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. DO THE DISCLAIMERS IN ARIZONA'S ENABLING ACT AND CONSTITUTION DEPRIVE ITS STATE COURTS OF JURISDICTION TO ADJUDICATE WATER RIGHTS CLAIMED BY THE UNITED STATES FOR INDIAN TRIBES, NOTWITHSTANDING THE McCARRAN AMENDMENT AND THIS COURT'S HOLDING IN *COLORADO RIVER WATER CONSERVATION DISTRICT V. UNITED STATES*?

II. DID THE ARIZONA DISTRICT COURT CORRECTLY DETERMINE THAT CONSIDERATIONS OF WISE JUDICIAL ADMINISTRATION REQUIRE ADJUDICATION OF ALL CONFLICTING WATER RIGHTS IN A COMPREHENSIVE STATE GENERAL ADJUDICATION, RATHER THAN THROUGH PIECEMEAL FEDERAL ACTIONS?

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* Pursuant to Rule 28.1, Rules of the Supreme Court of the United States, petitioners Phelps Dodge Corporation and Phelps Dodge Industries, Inc., hereby submit the following list of corporate subsidiaries (except wholly-owned subsidiaries) and affiliates: Alambres y Cables de Panama, S.A.; Alambres y Cables Venezolanos, C.A.; Apache Powder Company; Asian Cable Corporation Limited; Bisbee Queen Mining Company; Cables Electricos Ecuatorianos, C.A.; Cobre Cerrillos, S.A.; Conducen, S.A.; Conductores Electricos de Centro America, S.A.; CONELEC, S.A.; Electroconductores de Honduras, S.A. de C.V.; FACELEC, S.A.; Industria de Electroconductores, S.A.; Manila Pilares, S.A. de C.V.; Metal Fabricators of Zambia Limited; PDTL Trading Company, Limited; Phelps Dodge Philippines, Inc.; Phelps Dodge Svenska Metallverken International Corporation; Phelps Dodge Thailand Limited; South Australian Uranium Corporation Pty. Limited; Southern Peru Copper Corporation; Southern Peru Copper Sales Corporation; Viem Metal Works, S.A.; Woodlawn Properties Pty. Limited. Phelps Dodge Corporation is the parent company of which Phelps Dodge Industries, Inc., is a wholly-owned subsidiary.

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SAN CARLOS APACHE TRIBE OF ARIZONA AND THE NAVAJO TRIBE OF INDIANS, ET AL.,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners State of Arizona, Arizona State Land Department, the City of Phoenix and the City of Prescott, Arizona, Salt River Valley Water Users' Association, Salt River Project Agricultural Improvement and Power District, Phelps Dodge Corporation and Phelps Dodge Industries, Inc., respectfully pray that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Ninth Circuit entered in these proceedings on February 23 and 24, 1982.[1]

Each of these petitioners was a party to one or more of the Arizona appeals decided by the Ninth Circuit in *San Carlos Apache Tribe v. Arizona*, 668 F.2d 1093 (February 23, 1982), and *Navajo Nation v. United States*,

[1] Pursuant to Rule 19.4, Rules of the Supreme Court of the United States, these petitioners seek review of two companion cases decided by the United States Court of Appeals for the Ninth Circuit one day apart which involve identical questions.

668 F.2d 1100 (February 24, 1982). The respondents to this petition for writ of certiorari will be the Indian tribes which were appellants before the Ninth Circuit — namely, the San Carlos Apache Tribe of Arizona, the Payson Community of Yavapai-Apache Indians, the Salt River Pima-Maricopa Indian Community, the Fort McDowell Mohave-Apache Indian Community and the Navajo Nation aka the Navajo Tribe of Indians.

OPINIONS BELOW

The opinion of the Court of Appeals in *San Carlos Apache Tribe v. Arizona* is reported at 668 F.2d 1093, and the opinion in *Navajo Nation v. United States* is reported at 668 F.2d 1100. (App. A and B, *infra*, at 1-13, 1-4).[2] The order of the district court in *Navajo Nation v. United States* was not reported. (App. D, *infra*, at 1). The opinion of the district court relating to all of the other cases is reported at 484 F.Supp. 778 (D. Ariz. 1980). (App. E, *infra*, at 1-15).

JURISDICTION

The judgments of the Court of Appeals were entered on February 23 and 24, 1982, and this petition for certiorari was filed within 90 days of those dates. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Section 20 of the Federal Enabling Act of June 20, 1910, 36 Stat. 557, 569, provides in pertinent part:

> And said convention shall provide, by an ordinance irrevocable without the consent of the United States and the people of said State-

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[2] Since the opinions in these two cases relied heavily upon the reasoning and analysis in *Northern Cheyenne Tribe v. Adsit*, 668 F.2d 1080 (9th Cir. February 22, 1982), a copy of that opinion is included as Appendix C, *infra*, at 1-22.

Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; . . . .

2. Article XX, Section 4 of the Arizona Constitution provides in pertinent part:

Fourth. The people inhabiting this State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.

3. United States Code, Title 43:

Section 666. Suit for adjudication of water rights — Joinder of United States as defendant; costs

(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right

to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances; *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

4. United States Code, Title 25:

Section 1322. Assumption by State of civil jurisdiction—Consent of United States; force and effect of civil laws.

(a) The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

5. United States Code, Title 25:

Section 1324. Amendment of State constitutions or statutes to remove legal impediment; effective date

Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this subchapter. The provisions of this subchapter shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be.

STATEMENT OF THE CASE

Arizona, like Colorado, New Mexico and most other western states, follows the doctrine of prior appropriation in defining relative water rights in the stream systems of the

state.[3] In these states, the only meaningful way to adjudicate relative water rights is in a general adjudication, in which all potential claimants are joined and in which each claimant's water right is determined vis-a-vis the right of every other claimant.

Historically, the process of comprehensive river system adjudication was often frustrated in the western states by the impossibility of joining the United States as an involuntary defendant. In 1952, Congress recognized the importance of compelling the United States' presence in these actions through its enactment of the McCarran Amendment, 43 U.S.C. § 666, which permitted the United States' involuntary joinder in comprehensive river system adjudications.[4]

Application of the McCarran Amendment's special waiver of the United States' sovereign immunity is particularly important in Arizona where the United States controls extensive land holdings. Indeed, Arizona's Salt and Verde rivers, which provide all of the surface water for the State's rapidly expanding municipal and industrial population in the cities of Phoenix, Tempe, Mesa, Scottsdale, Chandler, Glendale, Peoria, Sun City and Tolleson, as well as much of the Salt River Valley's irrigation water, are bordered upstream by extensive federal lands, including four Indian reservations. Additional federal lands and reservations are scattered across the 13,000 square mile watershed which feeds these critical river systems.

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[3] In *Arizona v. California*, 373 U.S. 546, 555 (1963), this Court explained that under the doctrine of prior appropriation, "the one who first appropriates water and puts it to beneficial use thereby acquires a vested right to continue to divert and use that quantity of water against all claimants junior to him in point of time. 'First in time, first in right' is the short hand expression of this legal principle."

[4] See, Senate Report No. 755, 82d Cong., 1st Sess. (1951) (App. F *infra*, 1-19).

On April 26, 1974, the Salt River Valley Water Users' Association invoked Arizona's statutory general adjudication procedure[5] by filing a petition with the Arizona State Land Department to determine the conflicting rights to the use of water of the Salt River and its tributaries. It filed a similar petition on February 25, 1976, for the Verde River and its tributaries. On February 17, 1978, Phelps Dodge Corporation filed two petitions—one to determine conflicting rights to the use of water in the Gila River[6] and the other to determine conflicting rights to the use of water in the Little Colorado River.[7]

In January and February of 1979, process was served by certified mail on approximately 12,000 known potential water claimants in the Salt River general adjudication, including the United States.[8] In July, 1981, process was similarly served on some 58,000 known potential water claimants, including the United States, in the Little Colorado River general adjudication. The United States was joined pursuant to the McCarran Amendment, 43 U.S.C. § 666(b), to adjudicate not only its own rights, but also those rights it holds on behalf of its Indian wards. Service

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[5] A.R.S. § 45-231 *et seq.* In 1979, the Arizona legislature refined the statutory general adjudication procedure which had been in effect in Arizona for over fifty years. These revisions are codified at A.R.S. § 45-251 *et seq.* In accordance with these amendments, the Salt, Verde, Gila and Little Colorado general adjudications were transferred from the State Land Department to the Arizona Superior Court, where they are presently pending.

[6] The Salt and Verde rivers are the major tributaries to the Gila River, the drainage area of which covers more than half the area of the State of Arizona.

[7] The drainage area of the Little Colorado River covers another 19% of the State of Arizona, as well as 5,297 square miles within the State of New Mexico. The Navajo Indian Reservation is situated on the Little Colorado watershed in both Arizona and New Mexico; the Hopi Indian Reservation is located entirely on Arizona's share of that watershed.

[8] Service of process upon known potential claimants to the Verde River has not yet occurred; however, it is anticipated that approximately 80,000 persons will be served by certified mail as potential claimants.

of process on unidentified potential water claimants was also effected by publication in numerous newspapers of general circulation throughout the affected areas. On November 25, 1981 the Arizona Supreme Court consolidated the adjudications of the Salt and Verde rivers into the Gila River system adjudication.

After service of process in the Salt River general adjudication, the six Indian tribes on that watershed filed actions in the Arizona district court to stop the general adjudication in state court. The White Mountain Apache Tribe, the Gila River Indian Community and the Salt River Pima-Maricopa Indian Community filed removal petitions.[9] Other tribes filed complaints in the district court seeking declarations that the Arizona state courts lacked jurisdiction to adjudicate Indian water rights due to Arizona's Enabling Act and constitutional disclaimers of "all right and title" to Indian lands. See, Act of June 20, 1910, 36 Stat. 557, 569; Ariz. Const. Art. XX, § 4. These tribes also requested the district court to enjoin any further proceedings in the state courts.[10] Two other tribes took a different approach. The Fort McDowell Mohave-Apache Indian Community sought a declaration only of *its* water rights in the Verde River in a "defendant class ac-

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[9] *White Mountain Apache Tribe Petition for Removal*, No. CIV 79-182 PHX VAC (D. Ariz. petition filed March 7, 1979); *Gila River Indian Community Petition for Removal*, No. CIV 79-183 PHX VAC (D. Ariz. petition filed March 7, 1979); *Salt River Pima-Maricopa Indian Community Petition for Removal*, No. CIV 79-184 PHX VAC (D. Ariz. petition filed March 7, 1979).

[10] *Salt River Pima-Maricopa Indian Community v. State of Arizona*, No. CIV 79-185 PHX VAC (D. Ariz. complaint filed March 7, 1979); *San Carlos Apache Tribe of Arizona v. State of Arizona*, No. CIV 79-186 PHX VAC (D. Ariz. complaint filed March 7, 1979); *Payson Community of Yavapai-Apache Indians v. State of Arizona*, No. CIV 79-187 PCT VAC (D. Ariz. complaint filed March 7, 1979). The San Carlos Apache Tribe and the Payson Community of Yavapai-Apache Indians also sought removal of the state general adjudication in the alternative.

tion."[11] This approach was also followed by the San Carlos Apache Tribe with respect to its claim to the Salt River.[12] None of these actions sought a comprehensive river system adjudication of all relative water rights.

Finally, the Navajo Tribe filed a complaint in federal court seeking a general adjudication of all conflicting water rights in the watershed of the Little Colorado River,[13] but it promptly filed an amended complaint to convert its action into another "defendant class action" after the State of Arizona moved to dismiss the complaint.[14]

The district court's jurisdiction over the tribes' removal actions was asserted pursuant to 28 U.S.C. § 1441. Jurisdiction over the other tribal actions was asserted pursuant to 28 U.S.C. §§ 1331, 1332, 1362, 2201, 2202 or combinations thereof.

Motions to remand and motions to dismiss these actions, grounded principally on this Court's decision in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), were promptly filed by the petitioners. The district court, the Honorable Valdemar A. Cordova presiding, permitted extensive briefing and oral argument on the issues. After this Court denied a writ of certiorari to the Tenth Circuit Court of Appeals in *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116 (10th Cir.), *cert. denied*, 444 U.S. 995 (1979), Judge Cordova, in reliance upon *Colorado River* and *Jicarilla Apache Tribe*, held that the proceedings

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[11] *Fort McDowell Mohave-Apache Indian Community v. Salt River Valley Water Users' Association*, No. CIV 79-267 PHX VAC (D. Ariz. complaint filed April 13, 1979).

[12] *San Carlos Apache Tribe v. State of Arizona*, No. CIV 79-269 PHX CAM (D. Ariz. complaint filed April 16, 1979).

[13] *Navajo Nation v. United States*, No. 79-276 PCT VAC (D. Ariz. complaint filed April 17, 1979).

[14] The Navajo Tribe explained to the Ninth Circuit that it had converted its lawsuit from a general adjudication to a "defendant class action" in order "to obtain a federal court determination of the Navajo Nation's federal rights." *Opening Brief of Appellant Navajo Nation*, at 11.

in the Arizona courts were general adjudications in which all federal water rights, including those held on behalf of Indians, could properly be determined pursuant to the McCarran Amendment. Specifically, Judge Cordova adopted the reasoning of the Tenth Circuit in *Jicarilla Apache Tribe:* "To hold now that the Arizona disclaimer clauses and similar clauses contained in the enabling acts of six other Western states bar general water rights adjudications in the State court would defeat the [McCarran] Amendment's objective." (App. E at 10). He also held that "[t]hose rights which are State created will be determined by State law and Federal law will be applied to determine those rights which derive from Federal law." (App. E at 13). Accordingly, Judge Cordova granted the petitioners' motions to remand and the motions to dismiss the tribes' federal actions. In the Navajo Tribe's lawsuit, Judge Cordova denied the motion to dismiss, but stayed the federal proceedings pending determination of the Navajo Tribe's water rights in the state court general adjudication on the Little Colorado River.

The remand of the removal cases was not appealed. The other five cases were appealed by the tribes to the Court of Appeals for the Ninth Circuit. These appeals were consolidated for oral argument before Presiding Judge Merrill and Judges Choy and Ferguson on July 15, 1981. The Ninth Circuit also scheduled twelve consolidated appeals from the Montana district court, involving similar issues, for hearing later that day, although the Montana appeals were never formally consolidated with the Arizona cases.

Reversing the district court, the Ninth Circuit rendered its split decisions on February 23 and 24, 1982, in *San Carlos Apache Tribe v. State of Arizona* and *Navajo Nation v. United States.* The two judge majority relied on its February 22, 1982 decision on the twelve Montana appeals

in *Northern Cheyenne Tribe v. Adsit* in holding that, notwithstanding the McCarran Amendment, the Arizona state courts lack jurisdiction to determine water rights held by the United States on behalf of its Indian wards.

Rejecting the Tenth Circuit's decision in *Jicarilla Apache Tribe v. United States*, upon which the district court had relied, the Ninth Circuit carved out an exception to the McCarran Amendment's grant of state court jurisdiction by holding that Arizona's disclaimer provisions preclude its state courts from adjudicating Indian water rights. The court held that the state courts could properly assert such jurisdiction only if Arizona had complied with the procedures set forth in Public Law 83-280 even though it conceded that Public Law 83-280 "does not purport to limit the special consent to jurisdiction given by the McCarran Amendment." (App. C at 5). Accordingly, the two judge majority remanded the actions to the district court for the sole determination of whether Arizona had assumed jurisdiction under Public Law 83-280. (App. A at 11). Judge Merrill dissented in all three decisions, and further observed in the Arizona appeals that:

> [i]n my judgment wise judicial administration would not tolerate the confusion which these suits would create and the havoc they can be expected to play with the state's statutory efforts to deal with its problems of water scarcity — problems faced not just by Indians, but by every resident of the state; problems of such awesome dimensions that the state's efforts to solve them should have federal respect and encouragement. (App. A at 13).

As a result of the Ninth Circuit's decision in *San Carlos Apache Tribe v. State of Arizona*, the state court on March 24, 1982, stayed all further proceedings in the consolidated Gila River system adjudication until further review by this Court. (App. G, *infra*, at 1-2). Likewise, as a result of the Ninth Circuit's decision in *Navajo Nation v. United States*, the state court stayed all further proceedings in the Little Colorado adjudication, including the

May 1, 1982 deadline for filing statements of claimant, until further resolution of the issues by this Court. (App. H, *infra*, at 1).

REASONS FOR GRANTING THE WRIT

I

THE DECISIONS BELOW CONFLICT WITH THE DECISIONS OF THIS COURT AND THE COURT OF APPEALS FOR THE TENTH CIRCUIT AS TO THE SCOPE OF STATE COURT JURISDICTION GRANTED BY THE McCARRAN AMENDMENT.

A. *The Ninth Circuit's Decisions Contradict This Court's Interpretation of the McCarran Amendment.*

Through its 1952 enactment of the McCarran Amendment, Congress gave its consent to "join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source . . . ." 43 U.S.C. § 666(a). This amendment waived the sovereign immunity of the United States in comprehensive state and federal proceedings so as to permit the meaningful determination of all conflicting water rights.[15] In *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), this Court acknowledged that "[t]he clear federal policy evinced by [McCarran] is the avoidance of piecemeal adjudication of water rights in a river system," 424 U.S. 819, and held that "[t]he consent to jurisdiction given by the McCarran amendment bespeaks a policy that recognizes

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[15] In enacting the McCarran Amendment, the Congress was particularly concerned about the inability to adjudicate water rights in a meaningful manner whenever any water claimant claimed immunity from joinder in the adjudication proceedings:

> It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts.

S.Rep. No. 755, 82d Cong., 1st Sess., at 5 (1951).

the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals." *Id.*

This Court also held unequivocally in *Colorado River* that this policy of avoiding piecemeal adjudications required that *all* federal water rights, including those held by the United States on behalf of Indians, be subject to state court jurisdiction in proceedings under the McCarran Amendment. After analyzing "not only the amendment's language, but also its underlying policy", 424 U.S. at 811, this Court concluded that McCarran's consent necessarily reached water rights held on behalf of Indians:

> [t]hus, bearing in mind the ubiquitous nature of Indian water rights in the Southwest, it is clear that a construction of the [McCarran] amendment excluding those rights from its coverage would enervate the amendment's objective.

Id.

Attempting to distinguish *Colorado River*, the Ninth Circuit here carved out a debilitating exception to McCarran's grant of jurisdiction by holding that the congressional grant of state court jurisdiction embodied in McCarran did not extend to the State of Arizona because Arizona had agreed, as conditions to its admission, to "forever disclaim all right and title . . . to all lands lying within said boundaries owned or held by any Indian or Indian tribes" and that such lands shall "remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United

States. . . ."[16] (App. A at 7-8). These conditions were satisfied through the verbatim inclusion of the Enabling Act's language in the Arizona Constitution. Ariz. Const. Art. XX, § 4. The Ninth Circuit held that until this constitutional disclaimer is expressly repealed in the manner required under state law, state court jurisdiction to adjudicate federal claims for Indian water rights is barred in Arizona, notwithstanding the McCarran Amendment. (App. C at 8).

Apparently unaware that identical disclaimer and Public Law 83-280 arguments had been unsuccessfully asserted before the Court in *Colorado River*,[17] the Ninth Circuit took the step this Court refused to take in *Colorado River* "to enervate the amendment's objective" by excluding Indian water rights from its ambit.

B. *The Ninth Circuit's Decisions Reject This Court's Interpretation of the Western Disclaimer Provisions and Conflict with the Tenth Circuit's Interpretation of the Identical Disclaimer Provisions.*

The Ninth Circuit conceded that its interpretation of the McCarran Amendment and the Arizona disclaimer provisions conflicts with the Tenth Circuit's interpretation of McCarran and New Mexico's identical disclaimer

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[16] The New Mexico and Arizona Enabling Acts were both contained in the Act of June 20, 1910, 36 Stat. 557. The first eighteen sections apply to New Mexico; the remaining sections apply to Arizona.

Idaho, Montana, North Dakota, South Dakota, Utah, Washington and Wyoming have Enabling Acts or constitutional disclaimers essentially identical to Arizona's and New Mexico's. See North Dakota, South Dakota, Montana and Washington Enabling Acts, 25 Stat. 676, 677 (1889); Idaho Const. Art. 21, § 19, ratified by Congress, 26 Stat. 215 (1890); Wyo. Const. Art. 21, § 26, ratified by Congress, 26 Stat. 222 (1890); Utah Enabling Act, 28 Stat. 107, 108 (1894). Related provisions are present in the Oklahoma and Alaska Enabling Acts. See Oklahoma Enabling Act, 34 Stat. 267, 270 (1906); Alaska Enabling Act, 72 Stat. 339 (1958), as amended by 73 Stat. 141 (1959).

[17] Amicus Curiae Brief of Southern Ute Indian Tribe (and 14 tribes or other Indian organizations) filed in *Colorado River*, at 6 and 23-26.

provisions[18] in *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116 (1979), *cert. denied*, 444 U.S. 995 (1979).[19] Charging that the Tenth Circuit "refused to recognize the distinction between states with constitutional disclaimers and those without," (App. C. at 9), the Ninth Circuit rejected the Tenth Circuit's determination that the McCarran Amendment granted all states, including the nine western disclaimer states, subject matter jurisdiction in comprehensive proceedings to adjudicate all federal claims of water rights, including those held on behalf of Indian tribes. In this regard, the Ninth Circuit overlooked this Court's repeated holdings that Congress has plenary authority over Indians and Indian lands,[20] a power that Congress exercised through "the special consent to jurisdiction given by the McCarran amendment." *Colorado River*, 424 U.S. at 812, n. 20.

In *Jicarilla Apache Tribe*, the Tenth Circuit did not, as claimed by the Ninth Circuit, ignore the "jurisdictional distinction" created by the disclaimer. Rather, the Tenth Circuit first analyzed McCarran's legislative history and the previous emphasis by this Court on that legislative history in *Colorado River* to conclude that the United States was intended "to represent, as guardian, the federally reserved

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[18] New Mexico's admission was subjected to identical conditions. See Section 2 of New Mexico's Enabling Act, 36 Stat. 557, 558-559 (June 20, 1910). These identical conditions were also included in the New Mexico Constitution. N.M. Const. Art. XXI, § 2.

[19] In refusing to follow the Tenth Circuit's lead in *Jicarilla*, the Ninth Circuit emphasized that except for the Tenth Circuit decision, it found no case which permitted a disclaimer state to adjudicate Indian water rights. (App. C at 9). But see, *State ex rel. Reynolds v. Lewis*, 88 N.M. 636, 545 P.2d 1014 (1976). However, the converse of this statement is even more compelling. Not even a single case supports the Ninth Circuit's holding that disclaimer states, following McCarran's passage in 1952, are still precluded from adjudicating federal claims for Indian tribes. Thus, the conflict between the Ninth and Tenth Circuits is complete.

[20] *See, e.g., Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 594 (1977); *Lone Wolfe v. Hitchcock*, 187 U.S. 553, 564-67 (1903).

rights of the Indian tribes in any state court general water adjudication proceeding. . . ." 601 F.2d at 1130. Since the United States, not the tribes, was the proper party defendant in the state proceeding because it "owned" the federal rights under *Colorado River's* reasoning, the Tenth Circuit held there was no conflict between the state courts' assumption of jurisdiction under McCarran and the New Mexico disclaimer.

The Tenth Circuit next analyzed the extent to which the New Mexico disclaimer provisions were even relevant to the adjudication of federal water rights in a state court. By contrast, the Ninth Circuit commenced its analysis with an "analytic framework" which assumed without analysis that the Arizona disclaimer provisions were a complete and absolute relinquishment of "subject matter jurisdiction over Indian water rights." (App. C at 7-8). In so holding, the Ninth Circuit interpreted the disclaimer's "absolute jurisdiction and control" language as meaning exclusive federal jurisdiction, an interpretation that this Court explicitly rejected in *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962).

In believing that the Tenth Circuit "went too far by relying upon the distinction between proprietary and governmental functions drawn in *Kake* and *White Mountain Apache Tribe*,"[21] the Ninth Circuit rejected the principle that the disclaimer of all right and title to Indian lands is a relinquishment only of the state's proprietary interest to such lands, not its governmental interest. (App. C at 11).

Yet, this Court recognized in *Kake* that the western states' disclaimer provisions were disclaimers of only proprietary interests, not governmental interests; *Kake* specifically held that " 'absolute' federal jurisdiction is not invariably exclusive jurisdiction". *Id.* at 68. Accordingly, it

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[21] *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274, 1280 (9th Cir. 1981).

confirmed Alaska's authority to regulate Indian fishing rights despite its disclaimer of "absolute jurisdiction and control" over Indian fishing rights. Alaska Statehood Act § 4, 72 Stat. 339 (1958), as amended by 73 Stat. 141 (1959). Indeed, the Supreme Court reached this conclusion on the basis of its prior decision in *Williams v. Lee*, 358 U.S. 217 (1959), a case involving the jurisdiction of an Arizona court:

> Indian lands in Arizona remained "under the absolute jurisdiction and control" of the United States, 36 Stat. 557, 569; yet in *Williams v. Lee*, 358 U.S. 217, 220, 223, we declared that the test of whether a state law could be applied on Indian reservations there was whether the application of that law would interfere with reservation self-government.

369 U.S. at 67-68. Fifteen years later, this Court reiterated "the repeatedly stated view ... that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 147-48 (1973). *See also, Puyallup Tribe v. Washington Department of Game*, 433 U.S. 165, 173 (1977) (Washington state court has subject matter jurisdiction to determine on-reservation treaty fishing rights of reservation Indians). Although the Ninth Circuit conceded below that there was no interference with tribal self-government, it nevertheless summarily concluded that "[t]he power of a court in a disclaimer state to enforce a regulatory statute that may adversely affect Indians falls far short of the power to adjudicate a direct challenge to Indian water rights in and to the waters of streams." (App. C at 11).

The Ninth Circuit's holding not only departs radically from this Court's previous decision in *Kake* on the meaning and effect of the western disclaimer provisions, but it also rejects this Court's express holding in *Williams v. Lee* that:

> *absent governing Acts of Congress*, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.

358 U.S. at 220 (emphasis added). Here, the "governing Act of Congress" is the McCarran Amendment, which the Tenth Circuit specifically found to be the case in *Jicarilla Apache Tribe v. United States*, 601 F.2d at 1135, and which this Court specifically held in *Colorado River* to be "the most important" factor in favor of state court jurisdiction. 424 U.S. at 819.

In refusing to consider the McCarran Amendment as a governing Act of Congress, the Ninth Circuit explained that it was unwilling to allow "federal courts to give up their protective jurisdiction over Indian lands, including water rights", (App. C at 9-10), notwithstanding this Court's contrary holding in *Colorado River* that:

> [m]ere subjection of Indian rights to legal challenge in state court, however, would no more imperil those rights than would a suit brought by the Government in district court for their declaration, a suit which, absent the consent of the amendment, would eventually be necessitated to resolve conflicting claims to a scarce resource.

424 U.S. at 812. Here, also, the adjudication of the United States' water rights, including those held on behalf of Indians, in the Arizona state courts will "not imperil those rights." Federally created rights will be determined in accordance with federal law; state created rights will be determined in accordance with state law. *See generally, United States v. District Court of Eagle County*, 401 U.S. 520, 525-26 (1971); *United States v. District Court in and for Water Division No. 5*, 401 U.S. 527, 529-30 (1971). The Arizona state court is only providing the comprehensive procedural framework under McCarran through which all rights can be comprehensively adjudicated *inter sese* on the Salt, Verde, Gila and Little Colorado river systems. The

State's paramount interest is its governmental interest in securing a comprehensive adjudication under its "established elaborate procedures for allocation of water and adjudication of conflicting claims to that resource." *Colorado River*, 424 U.S. at 804; *see also Jicarilla Apache Tribe v. United States*, 601 F.2d at 1133 ("The contention [that the disclaimer applies only to proprietary interest] is particularly persuasive in light of the non-proprietary interest in subjecting the United States to a state action involving a general water right adjudication as provided under the McCarran Amendment.").

C. *The Ninth Circuit's Decisions Ignore the Express Terms of Public Law 83-280 and Reject Its Interpretation by This Court in Colorado River and by the Tenth Circuit in Jicarilla Apache Tribe v. United States.*

Public Law 83-280, 67 Stat. 588, as this Court observed in *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979), is a *general* jurisdictional statute that was enacted to deal with the "problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement". *Id.* at 471. Public Law 83-280 also permitted disclaimer states to repeal their disclaimers, where necessary, to assume the jurisdiction it authorized. Its inapplicability to water rights adjudications, however, is unmistakably clear from the face of the act itself, which provides in pertinent part that:

> [n]othing in this section . . . shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property ["including water rights"] or any interest therein.

25 U.S.C. § 1322(b).

In contrast to Public Law 83-280, the McCarran Amendment is a specific jurisdictional grant for the adjudication and determination of water rights in both state and federal courts. In *Colorado River* this Court recognized that the specific jurisdiction conferred by the McCarran Amend-

ment to adjudicate water rights, including those held on behalf of Indians, is not limited by the general jurisdictional provisions in Public Law 83-280:

> [i]t does not purport to limit the special consent to jurisdiction given by the McCarran amendment. A contrary conclusion is foreclosed by the principle of construction that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton v. Mancari*, 417 U.S. 535, at 550-551 (1974).

424 U.S. at 812 n. 20.

In *Jicarilla Apache Tribe v. United States*, the Tenth Circuit respected footnote 20 in *Colorado River*, which it noted was "of special application here". 601 F.2d at 1132. The majority in the decisions below conceded that footnote 20 in *Colorado River* was a "crucial footnote". (App. C at 5). Yet, after acknowledging that Public Law 83-280 "does not purport to limit the special consent to jursdiction given by the McCarran Amendment," *(Id.)*, the Ninth Circuit nonetheless remanded the Arizona decisions to the district court with the instruction that "[o]n remand the district court must determine if Arizona has properly asserted jurisdiction pursuant to Public Law 280."[22] (App. A at 11).

In rejecting the extensive 20 page analysis of the Tenth Circuit, the Ninth Circuit criticized *Jicarilla Apache Tribe v. United States* for failing to recognize the distinction between disclaimer and non-disclaimer states which Congress had drawn in Public Law 83-280. (App. C at 9). It also criticized the district court, which had relied on the Tenth Circuit decision, for the same reason.

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[22] No one has argued, either before the district court or before the Court of Appeals, that Public Law 83-280 empowers states to adjudicate federal water rights.

> The district court's decisions would rob the disclaimer/non-disclaimer distinction made by Congress of all significance and meaning . . . .

(*Id.* at 8).

The district court's decision could not possibly "rob the disclaimer/non-disclaimer distinction made by Congress" in Public Law 83-280 of significance and meaning because Public Law 83-280, by its very terms, is not even applicable to adjudications of water rights. To the contrary, the Ninth Circuit's decisions purport to create a disclaimer/non-disclaimer distinction in the McCarran Amendment, a distinction Congress did not see fit to draw. In fact, the decisions below, to paraphrase the Ninth Circuit's own language, "rob the McCarran Amendment of all significance and meaning" since nine of the western states intended to be the beneficiaries of the Amendment are disclaimer states.[23] Thus, the Ninth Circuit decisions render the McCarran Amendment impotent in the very region of the nation where Congress intended it to be utilized.

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[23] It is clear from the legislative history that the McCarran Amendment was enacted to permit the comprehensive adjudication of water rights in those states that follow the doctrine of prior appropriation — the western states — a fact further confirmed by Senator Watkins of Utah (a disclaimer state):

> I think we will have these hearings printed because the water rights people out West in all the States will be very much interested in this bill. In fact, nearly every State in the West is interested.

Hearings on S. 18 Before the Subcommittee of the Senate Committee on the Judiciary, 82nd Cong., 1st Sess. at 6 (1951).

II

THE DECISIONS BELOW RAISE SERIOUS AND RECURRING PROBLEMS CONCERNING EFFORTS BY THE STATES TO ADJUDICATE WATER RIGHTS

In *Colorado River* this Court specifically acknowledged the water-scarcity problem in the Southwest and the steps that several western states, including Arizona, have taken to address the problem:

> [i]t is probable that no problem of the Southwest section of the Nation is more critical than that of scarcity of water. As Southwestern populations have grown, conflicting claims to this scarce resource have increased. To meet these claims, several Southwestern States have established elaborate procedures for allocation of water and adjudication of conflicting claims to that resource.[2] [Footnote 2. See, e.g., Ariz. Rev. Stat. Ann. §§ 45-102 to 45-106, 45-141 to 45-154, 45-180 to 45-193, 45-231 to 45-245 (1956 and Supp. 1975). . . .]

425 U.S. at 804. Accordingly, to give effect to the McCarran Amendment, this Court held in *Colorado River* that all water rights should be determined in the specially-designed state court general adjudication rather than in a federal proceeding.

By excluding federal claims for Indian water rights from the scope of the McCarran Amendment in the nine western disclaimer states, the Ninth Circuit will effectively frustrate the efforts of many of these states to adjudicate all conflict-

ing water rights.[24] This necessarily precludes any of the nine western disclaimer states from administering the one most important resource upon which survival itself depends: water. In his dissent, Judge Merrill noted that these "problems of water scarcity — problems faced not just by Indians, but by every resident of the state [are] problems of such awesome dimensions that the state's efforts to solve them should have federal respect and encouragement." (App. A at 13).

Unlike *Colorado River*, this case does not involve a choice between a general adjudication in federal court and a general adjudication in state court. To the contrary, here there are *no* general adjudications pending in federal court,[25] a crucial fact that Judge Merrill emphasized in his dissent.

> In fact, however, the [federal] suits now before us would not even constitute piecemeal adjudication; rather, they would result in no effective adjudication at all. Since the suits do not seek general adjudication of the stream systems involved, the McCarran Amendment does not provide the consent of the United States to be sued. *Dugan v. Rank*, 372 U.S. 609, 617-19 (1963). Yet, on every stream system involved in these suits, the United States claims reserved rights. Similarly, on some of the stream systems, the rights of other Indian tribes are involved. They too are immune from

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[24] In *United States v. New Mexico*, 438 U.S. 696 (1978), involving a general adjudication in the New Mexico state courts, this Court noted:

> in the arid parts of the West, however, claims to water for use on federal reservations inescapably vie with other public and private claims for the limited quantities to be found in the rivers and streams. This competiton is compounded by the sheer quantity of reserved lands in the western States, which lands form brightly colored swaths across the maps of these States.

Id. at 699. Indeed, this Court further recognized that, because most federal reservations are situated in the high upstream lands, "[m]ore than 60% of the average annual water yield in the 11 western states is from federal reservations." *Id.* at 699 n. 3.

[25] In this respect, the Arizona cases differ from the Montana cases decided in *Northern Cheyenne Tribe v. Adsit*. (App. C at 1-2, 15).

> suit. *California v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979). As a result, an adjudication of the rights of the plaintiff Tribes would accomplish nothing since it could have no binding effect on the absent claimants. (App. A at 13).

The McCarran Amendment was enacted precisely to avoid the ineffective piecemeal adjudication of water rights endorsed by the Ninth Circuit in the decisions below.[26]

The conflict between the Ninth Circuit's decisions below and the Tenth Circuit's decision in *Jicarilla Apache Tribe v. United States* gives rise to an untenable situation in the Southwest. The watershed of the Little Colorado River encompasses Navajo reservation lands in both Arizona and New Mexico. However, even though Arizona and New Mexico were admitted into the Union under the same enabling act with identical disclaimer language in their constitutions, the water rights of the Navajo Tribe in the New Mexico portion of the Little Colorado River watershed *can* be determined in a New Mexico general adjudication, but the water rights of the same tribe in the Arizona portion of the

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[26] By prohibiting state court jurisdiction over Indian water rights, the Ninth Circuit's decisions preclude meaningful adjudication of *any* water rights in most of the western United States. The decisions below permit adjudication only in the federal courts. However, because the federal courts are courts of limited jurisdiction, *Owens Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 372-74 (1978), it is not clear that a state or private claimant of a water right arising under state law could initiate a general adjudication in federal court since complete diversity would obviously be lacking and since federal question jurisdiction arguably could not be pleaded. *See, e.g., Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125 (1974) (per curiam). If it could not be pleaded, only the United States or an Indian tribe could initiate a general adjudication in federal court by pleading jurisdiction pursuant to 28 U.S.C. §§ 1331, 1345 or 1362. This untenable situation, in which meaningful adjudication of water rights might be impossible without the voluntary cooperation of the United States, is precisely what the Congress intended to correct when it enacted the McCarran Amendment.

Little Colorado watershed *cannot* be determined in an Arizona general adjudication.[27]

Of course, New Mexico is only "theoretically" free to proceed in accordance with the Tenth Circuit's decision because the existence of subject matter jurisdiction can be challenged at any time—even 20 or 30 years after entry of a final decree. *See, e.g., Earle v. McVeigh*, 91 U.S. (1 Otto) 503, 507 (1876) ("[T]he want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced, or where any benefit is claimed under it, as the want of jurisdiction makes it utterly void and unavailable for any purpose."). Thus, it is imperative that the conflict between the Ninth Circuit and the Tenth Circuit over the subject matter jurisdiction of the western states to adjudicate their most important natural resource be resolved by this Court.

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[27] Furthermore, the Ninth Circuit's holding in *Northern Cheyenne Tribe* that the United States cannot assert the water rights that it holds on behalf of Indian tribes who claim conflicts of interest, and that those Indian tribes need not intervene in the adjudication to assert their own rights, effectively excludes Indian water rights from determination in general adjudications in all western states, including non-disclaimer states such as Colorado. This holding stands in glaring conflict with the Tenth Circuit's holding in *Jicarilla Apache Tribe v. United States* that "the United States is the proper party defendant in any general water right adjudication proceeding ... relating to federally created water rights including those reserved for use by Indian tribes." 601 F.2d at 1127. It also stands in direct contradiction to the Tenth Circuit's earlier holding in *New Mexico v. Aamodt*, 537 F.2d 1102, 1106-1107 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977), that Indian tribes may intervene as a matter of right in general adjudications under the McCarran Amendment if they do not wish to have their water rights asserted by their guardian, the United States.

III.

CONCLUSION

The Ninth Circuit in the decisions below excluded Indian water rights from the "special consent to jurisdiction given by the McCarran amendment", *Colorado River*, 424 U.S. at 812, n. 20, notwithstanding this Court's acknowledgment in *Colorado River* that "a construction of the [McCarran] amendment excluding those rights from its coverage would enervate the amendment's objective." *Id.* at 811. To reach this result, the Ninth Circuit rejected this Court's holding in *Organized Village of Kake v. Egan, supra*, as to the scope of the western disclaimer provisions. Furthermore, to bar state court jurisdiction in the nine western disclaimer states, the Ninth Circuit expressly rejected the Tenth Circuit's decision in *Jicarilla Apache Tribe v. United States*, which dealt with New Mexico's identical disclaimer provision from the very same Act of Congress.

The jurisdiction of Arizona and the other western states to adjudicate the one resource upon which life itself depends — which the Tenth Circuit upheld, but which the Ninth Circuit barred — must be addressed and definitively resolved by this Court. This Court should issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review, and to reverse summarily, its decisions below.

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May 1982

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

Filed - FEB. 23, 1982

SAN CARLOS APACHE TRIBE OF ARIZONA,
Plaintiff-Appellant,

v.

The STATE OF ARIZONA, a body politic; and the State Land Department of the State of Arizona; and John M. Little, Individually and as Acting Commissioner of the State Land Department of the State of Arizona; and Salt River Valley Water Users' Association, an Arizona Corporation, Defendants-Appellees.

PAYSON COMMUNITY OF YAVAPAI-APACHE INDIANS,
Plaintiff-Appellant,

v.

The STATE OF ARIZONA, a body politic; and the State Land Department of the State of Arizona; and John M. Little, Individually and as Acting Commissioner of the State Land Department of the State of Arizona; and Salt River Valley Water Users' Association, an Arizona Corporation, Defendants-Appellees.

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY,
Plaintiff-Appellant,

v.

The STATE OF ARIZONA and John M. Little, Acting Commissioner of the Arizona State Land Department, Defendants-Appellees.

FORT McDOWELL MOHAVE-APACHE INDIAN COMMUNITY, for and on behalf of itself and its members,
Plaintiff-Appellant,

v.

SALT RIVER VALLEY WATER USERS' ASSOCIATION; Salt River Project Agricultural Improvement and Power District; City of Phoenix; City of Prescott; City of Jerome; Phelps Dodge Corporation; Phelps Dodge Industries, Inc.; Arizona Water Company; Miller Brothers Farms, Inc.; Camp Verde Water Systems; Cottonwood Water Works,

Harold W. Bullard; and the State of Arizona, Individually and as representative of a class composed of all others similarly situated, Defendants-Appellees.

Nos. 80-5137, 80-5138, 80-5189 and 80-5219.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted July 15, 1981.

Decided Feb. 23, 1982.

Appeal from the United States District Court for the District of Arizona.

Before MERRILL, CHOY and FERGUSON, Circuit Judges.

CHOY, Circuit Judge:

Several Indian tribes appeal dismissal of petitions brought in federal district court to adjudicate their water rights in several water systems in the State of Arizona. The district court, in a consolidated order, dismissed the suits in favor of a state proceeding relying on *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). We reverse.

Appellants San Carlos Apache Tribe, Payson Community of Yavapai-Apache Indians, Salt River Pima-Maricopa Indian Community and Fort McDowell Mohave-Apache Indian Community (the Tribes) are federally-recognized Indian tribes occupying reservations located in the State of Arizona. The region is semi-desert with alluvial soils suitable for agriculture, but a low rainfall makes irrigation necessary. The only surface water available is provided by the Salt and Verde Rivers which are fed by a 13,000 square-mile watershed.

Appellees include the State of Arizona, various state officials, and the Salt River Valley Water Users' Association.

I. *Historical Overview*

A. *Prior Appropriation*

Most western states apply the doctrine of prior appropriation in establishing rights to the use of water. Under this doctrine, one acquires a right to water by diverting it from its natural source and applying it to some beneficial use. Continued beneficial use of the water is required in order to maintain the right. In periods of shortage, priority among confirmed rights is determined according to the date of initial diversion.[1] This doctrine, which is based on use, unavoidably brings the interest of state claimants into conflict with Indian tribes who claim water rights under the *Winters* doctrine, which is based on need.

2. *Winters or Reservation Doctrine*

Indian water rights are created outside the system of state law and exist independently of that system. *Indian Water Rights: A State Perspective After Akin*, 57 Neb.L.Rev. 295 (1978). In *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908), the Supreme Court described the nature of Indian water rights. The Court held that each time the federal government sets aside land from the public domain for a federal purpose it implies a reservation of water resources to meet the needs of that land. An implied reservation of water for an Indian reservation will be found where it is necessary to fulfill the purposes of the reservation. They are reserved in trust to the federal government with a priority date as of the time the reservation was established. The United States thus holds legal title. *Arizona v. California*, 373 U.S. 546, 600, 83 S.Ct. 1468, 1498, 10 L.Ed.2d 542 (1963). Unlike the rights accruing to non-Indians based on beneficial use and nonuse, Indian water rights are reserved for present and future needs of the reservations. Federally reserved water rights affect 17 states. The precise extent and nature of most re-

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[1] *See Colorado River Water Conservation District v. United States*, 424 U.S. 800, 805, 96 S.Ct. 1236, 1240, 47 L.Ed.2d 2483 (1976).

served rights have yet to be determined.[2]

The *Winters* doctrine is the source of major problems for dry, western states. As water is reserved for tribes for current and future needs, the quantity required is unspecified. Without jurisdiction over the tribal lands or a description of the scope of the reserved right, states are unable to develop comprehensive water allocation plans with certainty.

In 1952, Congress passed the McCarran Amendment, 66 Stat. 560, 43 U.S.C. § 666, consenting to state court jurisdiction over the United States when litigation involves comprehensive adjudication of water rights. The amendment provides that "consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit." Previously,

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[2] In *Arizona v. California*, 373 U.S. 546, 600, 83 S.Ct. 1468, 1498, 10 L.Ed.2d 542 (1963), the Supreme Court reaffirmed the *Winters* reservation doctrine and further affirmed the special master's conclusion as to the quantity of water intended to be reserved. The finding in that case was that the reserved water was intended to satisfy the future as well as the present needs of the Indian reservation and enough water was reserved to irrigate all the practicably irrigable acreage on the reservations.

In *United States v. New Mexico*, 438 U.S. 696, 98 S.Ct. 3012, 57 L.Ed.2d 1052 (1978), in determining the extent of an implied reservation of water for a national forest, the Supreme Court held:

> Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.

438 U.S. at 702, 98 S.Ct. at 3015. The Ninth Circuit applied the *New Mexico* test to determine Indian reserved water rights in *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9 Cir. 1981).

the United States could not be joined in water rights adjudication because of sovereign immunity. The McCarran Amendment waives the sovereign immunity in general water rights adjudications. The purpose of the McCarran Amendment was to eliminate the uncertainty engendered by the inability to compel adjudication of federal water rights. The amendment grants state courts the power to adjudicate federal water rights.

4. *Akin Decision*

In *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) (Akin),[3] the Supreme Court interpreted the McCarran Amendment. The question in *Akin* concerned the effect of the McCarran Amendment upon the jurisdiction of the federal district courts under 28 U.S.C. § 1345 over suits for determination of water rights brought by the United States as trustee for certain Indian tribes and as owner of various non-Indian Government claims. In *Aki* the Government brought suit in the United States District Court for the District of Colorado, invoking the court's jurisdiction under 28 U.S.C. § 1345. 28 U.S.C. § 1345 provides:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

In the suit, the Government asserted reserved rights on its own behalf and on behalf of certain Indian tribes, as well as rights based on state law.

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[3] This decision was an appeal from *United States v. Akin*, 504 F.2d 115 (10th Cir. 1974).

Shortly after the federal suit was commenced, one of the defendants in that suit filed an application in the state court for Division 7[4] seeking an order directing service of process on the United States in order to make it a party to proceedings in Division 7 for the purpose of adjudicating all of the Government's claims, both state and federal. On January 3, 1973, the United States was served pursuant to authority of the McCarran Amendment. Several defendants and intervenors in the federal proceeding then filed a motion in the district court to dismiss on the ground that under the amendment, the district court was without jurisdiction to determine federal water rights. Without deciding the jurisdictional question, the district court, on June 21, 1973, granted the motion stating that the doctrine of abstention required deference to the proceedings in Division 7. On appeal, the Court of Appeals for the Tenth Circuit reversed, *United States v. Akin*, 504 F.2d 115 (1974), holding that the suit of the United States was within district court jurisdiction under 28 U.S.C. § 1345, and that abstention was inappropriate.

Certiorari was granted and in *Colorado River Water Conservation District v. United States*, the Supreme Court held that although the district court had jurisdiction over the action and abstention was improper, the dismissal was nevertheless proper under the doctrine of "wise judicial administration."

The Court first held that in view of the McCarran Amendment's language and legislative history and controlling principles of statutory construction, the amendment in no way diminished the jurisdiction of district courts under § 1345 to hear federal water rights suits. The Court found that the effect of the amendment was to give consent to ju-

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[4] Under Colorado law, the state is divided into Water Divisions with adjudication of water claims within each Division occurring on a continuous basis.

risdiction in the state courts concurrent with jurisdiction in the federal courts over controversies involving federal rights to the use of water. 424 U.S. at 808-809, 96 S.Ct. at 1241-1242.

The Court also concluded specifically that the state court had jurisdiction over Indian water rights under the McCarran Amendment. *Id.* at 809, 96 S.Ct. at 1242. This finding was based both on the amendment's language and its underlying policy of avoiding piecemeal adjudication of water rights in a river system. The Court went on to hold that the district court dismissal could not be supported under the doctrine of abstention in any of its forms.

The Court held finally that the dismissal was proper due to considerations of "wise judicial administration" in a situation involving concurrent state-federal jurisdiction.

II. *Issues on Appeal*

1. Does the federal Enabling Act authorizing Arizona's admission to the Union, and the state's disclaimer clause in its constitution prohibit Arizona from exercising jurisdiction over Indian tribes?
2. Even if the Arizona courts had jurisdiction, did the district court improperly apply the doctrine of "wise judicial administration" in dismissing the case?

III. *Disclaimer Issue*

Arizona was admitted to the Union on condition that it disclaim right and title to and jurisdiction over Indian lands. The Arizona Enabling Act (36 Stat. 569) provides in relevant part:

> Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extin-

guished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.

The Arizona constitution disclaims jurisdiction over Indian lands providing:

FOURTH. PUBLIC LANDS,
INDIAN LANDS.

Fourth. The people inhabiting this State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.

Arizona Constitution, article 20, paragraph 4.

The Tribes contend that the disclaimer provisions bar jurisdiction over the Indians and were not repealed by the McCarran Act.[5] The district court rejected this contention citing *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116 (10th Cir.), *cert. denied*, 444 U.S. 995, 100 S.Ct. 530, 62 L.Ed.2d 426 (1979). We disagree.

The Arizona Enabling Act and constitutional disclaimer provisions are essentially identical to the Montana Enabling Act and constitutional disclaimer provisions. In reaching the conclusion that Arizona has disclaimed juris-

[5] The disclaimer was not an issue in the *Akin* case as Colorado did not disclaim jurisdiction over Indian lands.

diction over the Indian lands we adopt in full the reasoning and analysis found in *Northern Cheyenne Tribe v. Adsit*, No. 79-4887, slip op. p.____, ____ F.2d ____ (9th Cir. February 22, 1982).

As in the *Northern Cheyenne* case, we find it necessary to remand for a determination of whether Arizona has obtained jurisdiction over the Indians pursuant to Public Law 280.

IV. *Application of the Doctrine of "Wise Judicial Administration"*

Without much discussion, and purporting to follow the Supreme Court's *Akin* decision, the district court dismissed the federal action "in light of considerations of federal judicial restraint in State matters and judicial administration, further giving regard to the conservation of judicial resources and the comprehensive disposition of litigation." 487 F.Supp. at 784.

The Supreme Court in *Akin* held that the state and federal courts had concurrent jurisdiction over controversies involving federal rights to the use of water and that the district court's dismissal of the federal action was improper under the doctrine of abstention. The Court, nevertheless, held the dismissal proper under the doctrine of "wise judicial administration."

The Court stated that the circumstances permitting a dismissal for reasons of wise judicial administration "are considerably more limited than the circumstances appropriate for abstention," 424 U.S. at 818, 96 S.Ct. at 1246, and the Court referred to the necessary circumstances as "exceptional." The factors that the Supreme Court stated could be considered include which court first assumed jurisdiction over the property, the inconvenience of the federal forum, the avoidance of piecemeal litigation and the order in which jurisdiction was obtained by the concurrent forum. The Court stated:

No one factor is necessarily determinative; a carefully

> considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required. Only the clearest of justifications will warrant dismissal.

The Court found the dismissal to be proper, considering such factors as (1) the state's established single continuous proceeding for water rights adjudication which antedated the district court suit, (2) the apparent absence of any proceedings in the district court, other than the filing of the complaint, prior to the motion to dismiss, (3) the extensive involvement of state water rights occasioned by this suit naming 1,000 defendants, (4) the 300-mile distance between the district court in Denver and the court in Division 7, and (5) the existing participation by the Government in Divisions 4, 5, and 6 proceedings.

The Court in *Akin* refers to "wise judicial administration" as being proper only under "exceptional" circumstances. The Court specifically did not decide whether dismissal would be warranted if more extensive proceedings had occurred in the district court prior to dismissal, if the involvement of state water rights were less extensive or if the state proceeding were in some respect inadequate to resolve the federal claims. 424 U.S. at 820, 96 S.Ct. at 1248. The Court also specifically left open the question of the application of the "wise judicial administration" doctrine to a water rights suit brought by a private party such as an Indian tribe rather than the United States. 424 U.S. at 801 n.26, 96 S.Ct. at 1248.

Our holding on the disclaimer issue makes it unnecessary for us to decide at this time whether dismissal under the doctrine of "wise judicial administration" would have been proper if Arizona had not disclaimed jurisdiction over the Indians. We note that the district judge did not make findings on this issue and the record indicates significant differences between these cases and the *Akin* case.

V. *Other Issues*

The Tribes raise several other issues, including the adjudication of ground-water claims, service of process, damage action, and the sovereign immunity of the United States in the *Navajo Nation* case. Due to our holding on the disclaimer issue we find it unnecessary to reach any other issues.

VI. *Conclusion*

We find the district court's conclusion that the disclaimer provisions in the Arizona Enabling Act and constitution do not preclude state jurisdiction over the Indians to be incorrect. On remand the district court must determine if Arizona has properly asserted jurisdiction pursuant to Public Law 280.

REVERSED and REMANDED.

MERRILL, Circuit Judge, dissenting:

For the reasons set forth in my dissent in *Northern Cheyenne Tribe v. Adsit*, ____F.2d____, I dissent from the Court's holding that the disclaimer clauses in the Arizona Statehood Act and the State Constitution deprive the state courts of jurisdiction to establish and adjudicate the reserved water rights of the United States held by it in trust for the Indian tribes.

Further I dissent from the Court's holding that wise judicial administration, as that term is used in *Akin*, does not call for dismissal of the federal suits. Here no suit seeks general adjudication of a stream system. In the suits brought by San Carlos Apache Tribe, Payson Community of Yavapai-Apache Indians and Fort McDowell Mohave-Apache Indian Community, the prayers are for adjudication only of the reserved rights of the plaintiff Tribes. The Salt River Pima-Maricopa Indian Community suit prays only to enjoin state court action and seeks no adjudication at all.

Thus, at best, the suits constitute piecemeal adjudication of the streams. While the rights held for Indians would be established, the rights of the other water users on the streams would not.

In these circumstances, principles of wise judicial administration clearly counsel against federal adjudication of the Tribes' claims. The *Akin* Court regarded the McCarran Amendment itself as the most important factor favoring state proceedings over federal. It stated:

> The clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system.... [T]he concern... with avoiding the generation of additional litigation through permitting inconsistent dispositions of property... is heightened with respect to water rights, the relationships among which are highly interdependent. Indeed, we have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings.... The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals.

424 U.S. at 819, 96 S.Ct. at 1247. The Court also quoted from the legislative history of the McCarran Amendment to this effect:

> In the administration of and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could

> materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts.

Id. at 810, 96 S.Ct. at 1242, quoting S.Rep.No. 755, 82d Cong., 1st Sess., 4-5 (1951).

In fact, however, the suits now before us would not even constitute piecemeal adjudication; rather, they would result in no effective adjudication at all. Since the suits do not seek general adjudication of the stream systems involved, the McCarran Amendment does not provide the consent of the United States to be sued. *Dugan v. Rank*, 372 U.S. 609, 617-19, 83 S.Ct. 999, 1004-05, 10 L.Ed.2d 15 (1963). Yet, on every stream system involved in these suits, the United States claims reserved rights. Similarly, on some of the stream systems, the rights of other Indian tribes are involved. They too are immune from suit. *California v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979). As a result, an adjudication of the rights of the plaintiff Tribes would accomplish nothing since it could have no binding effect on the absent claimants.

In my judgment wise judicial administration would not tolerate the confusion which these suits would create and the havoc they can be expected to play with the state's statutory efforts to deal with its problems of water scarcity—problems faced not just by Indians, but by every resident of the state; problems of such awesome dimensions that the state's efforts to solve them should have federal respect and encouragement.

For these reasons I would hold that wise judicial administration as a matter of law demands the dismissal of these suits and would affirm the district court.

APPENDIX B

Filed-FEB. 24, 1982

NAVAJO NATION, aka The Navajo Tribe of Indians,
Plaintiff-Appellant,

v.

UNITED STATES of America, State of Arizona,
Defendants-Appellees.

Nos. 80-5471, 80-5837.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted July 15, 1981.
Decided Feb. 24, 1982.

Reversed and remanded.

Merrill, Circuit Judge, filed dissenting opinion.

Appeal from the United States District Court for the District of Arizona.

Before MERRILL, CHOY and FERGUSON, Circuit Judges.

CHOY, Circuit Judge:

Appellant Navajo Nation appeals the district court's order staying its federal action. We reverse.[1]

I. *Facts*

The Navajo Nation brought this action under 28 U.S.C. § 1362 seeking a declaration of the tribe's rights to the Little Colorado River under its treaties with the United States and various federal statutes and orders.

The State of Arizona moved to dismiss the complaint for a lack of federal jurisdiction, arguing that the Navajo's claims should be decided as part of the state proceeding concerning the Little Colorado pursuant to the Supreme Court's decision in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47

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[1] This case was argued together with the cases decided in the consolidated opinion in *San Carlos Apache Tribe v. Arizona*, No. 80-5137, Slip. op. p. _____, _____ F.2d _____ (9th Cir. 1982).

L.Ed.2d 483 (1976) (*Akin*).[2]

The district court (Cordova, J.) denied Arizona's motion to dismiss, thereby recognizing that it had jurisdiction over the claim and that the amended complaint stated a good cause of action. At the same time, however, the district court, *sua sponte*, entered an order staying the federal action pending the trial and determination by the State Court of Arizona of the rights of claimants.

Appellant filed a notice of appeal on June 12, 1980, more than 30 days after entry of the stay. Appellant later asked the district court to certify the stay order for immediate appeal pursuant to 28 U.S.C. § 1292(b). On October 30, this court issued an order permitting appellant's 1292(b) appeal and consolidating it with the § 1291 appeal and authorized the panel to reconsider appellees' motion to dismiss the petition and the appeal.

II. *Issues*

1. Is this appeal properly before this court?
2. Did the district court err in staying the action?

III. *Analysis*

A. *Appealability of District Court Stay*

Arizona contends that this appeal is not properly before this court, arguing that the appeal was not timely filed and in addition that a stay is not an appealable order. The Navajo's § 1291 direct appeal was filed beyond the usual 30-day period but within the 60-day period for cases where the United States is a party. Arizona argues that the United States was never served with process and therefore the 60-day appeal period is inapplicable. Appellant disputes this and offers to provide proof of service. However, this issue is largely unimportant because on August 19, 1980, the dis-

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[2] For a detailed discussion of the *Akin* decision and Indian water rights in general, see the companion cases of *San Carlos Apache Tribe v. Arizona*, No. 80-5137, Slip op. p. _____, _____ F.2d _____ (9th Cir. 1982), and *Northern Cheyenne Tribe v. Adsit*, No. 79-3887, Slip op. p. _____, _____ F.2d _____ (9th Cir. 1982).

trict court (Hardy, J.) certified the stay order for immediate appeal under 28 U.S.C. § 1292(b) on the ground that the stay order "involves a controlling question of law as to which there is substantial ground for difference of opinion and ... an immediate appeal ... may materially advance the ultimate termination of the litigation."

Section 1292(b) provides in relevant part:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order.

On October 30, 1980, the Ninth Circuit granted the petition for permission to appeal under § 1292(b).

This court also ordered appellee's motion to dismiss the appeal as untimely denied without prejudice to appellee's raising, under 28 U.S.C. § 1291, the underlying jurisdictional issue before this panel. This court ordered the § 1291 appeal consolidated with the § 1292(b) appeal.

The issue of whether the appeal under § 1291 is proper is largely irrelevant at this time as the district court order is properly before the court as a § 1292(b) appeal.

B. *State Court Jurisdiction*

The district court stayed the federal action "pending the trial and determination by the State Court of Arizona of the rights of claimants, over which it has jurisdiction, to the water of the Little Colorado Watershed." The district court did not state its reasons for staying the federal action nor cite any authority for its action.

Our holding in *San Carlos Apache Tribe v. Arizona*, No. 80-5137, Slip op. p. ____, ____ F.2d ____ (9th Cir. filed February 23, 1982), that Arizona has disclaimed jurisdiction over the Indians' water rights compels us to reverse the district court's holding that the state court has jurisdiction over the Indian claims.

C. *Other Issues*

Because of our holding on the disclaimer issue we find it unnecessary to reach any of the other issues raised by the parties.

IV. *Conclusion*

This appeal is properly before this court pursuant to 28 U.S.C. § 1292(b). The order of the district court is REVERSED.

REVERSED and REMANDED.

MERRILL, Circuit Judge, dissenting:

I dissent for the reasons set forth in my dissents in *Northern Cheyenne Tribe v. Adsit* and *San Carlos Apache Tribe v. Arizona*, filed this day. In this case Navajo Nation does not seek a general stream adjudication. For the reasons set forth in my dissent in *San Carlos Apache Tribe* I would remand with instructions that the suit be dismissed.

APPENDIX C

Filed—FEB. 22, 1982

The NORTHERN CHEYENNE TRIBE OF the NORTHERN CHEYENNE INDIAN RESERVATION, et al.,
Plaintiffs-Appellants,

v.

Thomas Ralph ADSIT, et al.,
Defendants-Appellees.

Nos. 79-4887, 80-3028, 80-3032, 80-3038, 80-3040 to 80-3042, 80-3044, 80-3045 and 80-3061 to 80-3063.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted July 15, 1981.
Decided Feb. 22, 1982.

Appeal from the United States District Court for the District of Montana.

Before MERRILL, CHOY and FERGUSON, Circuit Judges.

FERGUSON, Circuit Judge:

The United States government and various Montana Indian tribes appeal the dismissal of consolidated actions brought to adjudicate federal and Indian water rights in Montana. The federal court actions were dismissed in favor of state court proceedings. Dismissal was predicated on the Supreme Court's decision in *Colorado River Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) (hereinafter "*Akin*"). Because *Akin* was erroneously applied to the facts of the Montana litigation, we reverse.

I. PROCEDURAL HISTORY.

In January, 1975, the Northern Cheyenne Tribe brought suit in United States District Court for the District of Montana to adjudicate water rights in the Tongue River and Rosebud Creek in Montana. Jurisdiction was alleged under

28 U.S.C. § 1362.[1] In March, 1975, the United States brought suit pursuant to 28 U.S.C. § 1345[2] for the same purpose, in its own right and as fiduciary on behalf of the Northern Cheyenne and other reservation tribes. In July, 1975, the Montana Department of Natural Resources and Conservation ("DNR") filed petitions in state court for a determination of all existing rights to those waters in accordance with existing state law.

In August, 1975, the United States brought suit in the district court on behalf of the Crow Tribe. Judge Battin consolidated the cases and stayed proceedings in February, 1976, pending the Supreme Court's decision in *Akin*. The State of Montana, a defendant in those cases, moved to dismiss as a result of that decision. At the same time, the Crow Tribe moved to intervene. Both motions were argued in the summer of 1976.

In February, 1979, the federal government and the tribes moved for expedited consideration. In April, 1979, the United States filed more actions in the district court seeking a declaration of water rights on behalf of the United States and four additional tribes.

On May 11, 1979, an amended state water consolidation plan, Montana Senate Bill 76, took effect. The Montana Supreme Court ordered implementation and authorized the DNR to notify relevant parties in June, 1979.

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[1] 28 U.S.C. § 1362 provides:
The district courts shall have original jurisdiction of all civil actions brought by any Indian tribe ... wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

[2] 28 U.S.C. § 1345 provides:
[T]he district courts shall have original jurisdiction of all civil actions or proceedings commenced by the United States, or by any agency or officer thereof ....

In July, 1979, Judge Hatfield stayed the federal actions initiated in 1979. In November of that year, Judges Battin and Hatfield issued a joint opinion dismissing all federal actions as an exercise of "wise judicial administration" as outlined in *Akin. Northern Cheyenne Tribe v. Tongue River Water Users*, 484 F.Supp. 31 (D.C.Mont. 1979).

The United States and the Indian tribes appeal that dismissal, arguing that it is predicated on an erroneous application of *Akin*. They maintain that because the Montana constitution and enabling act contain disclaimers of jurisdiction over Indian tribes, the litigation in that state differs from the Colorado litigation which was the subject of *Akin*. Further, they argue that the specific factors underlying the *Akin* decision are not present in the Montana litigation and that the contrast requires retention of federal jurisdiction.

II. THE DISCLAIMER ISSUE.

A. *Jurisdiction over Indian Water Rights.*

Traditionally, Indian water rights have been reserved in trust to the federal government. *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908); *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963), *overruled on other grounds*, 438 U.S. 645, 98 S.Ct. 2985, 57 L.Ed.2d 1018 (1977). Federal courts have consistently exercised jurisdiction over Indians on reservations, *Minnesota v. United States*, 305 U.S. 382, 59 S.Ct. 292, 83 L.Ed. 235 (1939), unless jurisdiction is explicitly granted to the states by congressional statute. *Fisher v. District Court of Montana*, 424 U.S. 382, 388, 96 S.Ct. 943, 947, 47 L.Ed.2d 106 (1976). Congress has granted state courts jurisdiction over Indian rights with respect to various criminal and civil matters, but in each grant, jurisdiction over Indian water rights has been specifically excluded. 28 U.S.C.

§ 1360(b); 18 U.S.C. § 1162(b); 25 U.S.C. § 1322.[3]

In 1952, Congress passed the McCarran Amendment, 43 U.S.C. § 666, granting state courts jurisdiction over the United States when litigation involves comprehensive adjudication of water rights and the United States is a necessary party.

> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit . . . .

43 U.S.C. § 666(a). The Amendment does not mention Indians or reservations. It is limited to waiving the sovereign immunity of the federal government with respect to water rights acquired "by . . . appropriation . . . or otherwise." In no way does the McCarran Amendment repeal any of the jurisdiction of the federal courts. The Amendment merely extends the United States' consent to suit in certain cases.

In 1976, the Supreme Court interpreted the McCarran Amendment as a grant of jurisdiction over water rights of Indian tribes when the right is asserted by the federal government as fiduciary. *Colorado River Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d

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[3] Each statutory section states:

> Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, *including water rights*, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States . . . .
>
> (emphasis supplied).

Sections 25 U.S.C. 1322(b) (alienation, encumbrance, taxation, use, and probate of property) and § 1360(b) (state civil jurisdiction in actions to which Indians are parties) further provide that nothing in these sections

> shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

483 (1976) (*Akin*). When the United States is a party to a proceeding involving these rights, the Court held that the ability of the state to assert jurisdiction over the federal government implicitly allows jurisdiction over the rights of tribes that, without the McCarran Amendment, would have been immunized by federal statutes against suits in state court.

In a crucial footnote, the Court noted the restrictions on jurisdiction over Indian water rights provided in 25 U.S.C. § 1322(b) and 28 U.S.C. § 1360(b).[6] *Id.* at 812, n.20, 96 S.Ct. at 1244, n.20. The Court, however, held that limiting language in those sections only qualifies the import of the general consent to state jurisdiction given by those sections; the language does not purport to limit the special consent to jurisdiction given by the McCarran Amendment. *Id.* Accordingly, the Court dismissed the federal proceeding in favor of the comprehensive ongoing state proceeding.

B. *Montana's Disclaimers and Public Law 83-280.*

The Montana litigation raises a question not at issue in *Akin*. In a state which, unlike Colorado, expressly disclaims jurisdiction over Indian lands within its constitution and enabling act, does the McCarran Amendment grant jurisdiction and thereby repeal the state disclaimers? We hold that it does not.

Montana was admitted to statehood in 1889 on condition that it disclaim right and title to jurisdiction over Indian lands. Montana's enabling act provides that the state "disclaim[s] all right and title to the unappropriated public lands . . . owned or held by any Indian or Indian tribes . . ." 25 Stat. 676 (1889). The disclaimer of title in the enabling act is reinforced by the disclaimer of jurisdiction in the

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[6] See footnote 3, *supra*.

Montana Constitution that specifically provides, "all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the United States . . . ." Art. I, Mont.Const. 1972.

Only a year after the passage of the McCarran Amendment, Congress passed Public Law 83-280 establishing a procedure whereby states could repeal disclaimers in their constitutions and enabling acts. Public Law 280, "the first jurisdictional statute of general applicability to Indian reservation lands," *Washington v. Yakima Indian Nation*, 439 U.S. 463, 471, 99 S.Ct. 740, 746, 58 L.Ed.2d 740 (1979), dealt with "the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement." *Bryan v. Itasca County*, 426 U.S. 373, 379, 96 S.Ct. 2102, 2106, 48 L.Ed.2d 710 (1953). Section 7 of that Act provides for automatic transfer of jurisdiction to the states by legislation. Section 6 deals with states which disclaim jurisdiction over Indians.

> Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this subchapter. The provisions of this subchapter shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be.

25 U.S.C. § 1324.

The Supreme Court held that the 1953 legislation allows assumption of jurisdiction in disclaimer states by legislative action. *Yakima, supra*, 439 U.S. at 484, 99 S.Ct. at 753. Federal law does not proscribe "the manner in which the States are to modify their organic legislation." *Id.* Accordingly, in those states which so provide, legislative action

alone suffices to repeal the constitutional disclaimer of jurisdiction over Indians. *Id.* Furthermore, in enacting § 6, Congress meant to remove any federal impediments to state jurisdiction that may have been created by an enabling act. *Id.* at 488, 99 S.Ct. at 755. Hence, the determination of whether legislative action is sufficient to repeal a disclaimer depends on whether such action is sufficient under the law of the acting state to amend its constitution. *Id.* at 493, 99 S.Ct. at 757.

Public Law 280 was amended in 1968 to provide "that States that have not extended criminal or civil jurisdiction to Indian country can make future extensions only with the consent of the tribes affected." 25 U.S.C. §§ 1321(a), 1322(a). *See Yakima, supra,* at 494, n.40, 99 S.Ct. at 758, n.40. Hence, after 1968, a state may repeal a disclaimer of jurisdiction over reservation Indians only with the consent of the affected tribes. In addition, the scope of consent is limited to the same jurisdiction provided automatic transfer states, *i.e.*, § 7 states. 25 U.S.C. § 1322.

C. *Analytic Framework.*

The McCarran Amendment overrides sovereign immunity of the United States in comprehensive water rights adjudications and the immunity of an Indian tribe represented by the government in such a proceeding. It cannot be read to amend a state constitution disclaiming subject matter jurisdiction over such matters.

A valid exercise of state jurisdiction requires that the state have both personal and subject matter jurisdiction. Via the McCarran Amendment, the United States has waived sovereign immunity from suit in certain cases involving water rights. In *Akin,* this waiver of sovereign immunity operated to give Colorado personal jurisdiction over the United States and implicitly allowed jurisdiction over the rights of otherwise immune Indian tribes in circumstances where the state had subject matter jurisdiction. However, when a state has chosen to disclaim subject matter jurisdiction over Indian water rights, the combination of

jurisdictional prerequisites necessary for a state court to hear a challenge to Indian water rights would appear to be lacking.

The appearance that subject matter jurisdiction is lacking in a state court in a disclaimer state would only be defeated by a finding that the disclaimer had been validly repealed. In order to make such a finding, a court must first determine whether the Montana water consolidation plan acts as a legislative repeal of the constitutional disclaimer of jurisdiction. *Washington v. Yakima, supra.* Second, it must determine whether such repeal required tribal consent as provided in the 1968 amendment to Public Law 280. Only if the Montana water legislation is determined to constitute a legislative repeal within the requirements of the federal law will the McCarran Amendment's grant of personal jurisdiction over the United States, acting as trustee for Indian water rights, furnish the state court with the requisite personal and subject matter jurisdiction. Only if a legislative repeal is found and the state has subject matter jurisdiction need one consult the waiver of immunity provisions of the McCarran Amendment and consequently the terms of *Akin.*

The district court made no such analysis. Instead, it determined that the disclaimer/non-disclaimer distinction was inconsequential to Congress in passing the McCarran Amendment. This conclusion cannot be accepted when viewed in light of the specific attention paid to the disclaimer/non-disclaimer distinction in P.L. 280 by Congress only a year after it passed the McCarran Amendment.

The district court's decision would rob the disclaimer/non-disclaimer distinction made by Congress of all significance and meaning, and would deprive the 1968 Amendment to P.L. 280, which requires tribal consent to a repeal of the disclaimer, of any effect. Accordingly, the district court's basis for decision was erroneous.

In so holding, we decline to follow the Tenth Circuit's decision in *Jicarilla Apache Tribe v. United States* 601 F.2d 1116 (10th Cir.), *cert. denied*, 444 U.S. 995, 100 S.Ct. 530, 62 L.Ed.2d 426 (1979). *Jicarilla*, in considering the precise issue raised here, refused to recognize the distinction between states with constitutional disclaimers and those without. For the reasons noted above, we believe that recognition of this distinction is crucial in deciding the jurisdiction issue.

Except for *Jicarilla*, with which we expressly disagree, no case brought to our attention permits a disclaimer state to adjudicate a challenge directed against Indian water rights. Construing the Montana enabling act, *Draper v. United States*, 164 U.S. 240, 247, 17 S.Ct. 107, 109, 41 L.Ed. 419 (1896), merely held that the disclaimer in Montana's enabling act did not deprive that state of power to punish for crimes committed on a reservation or Indian lands by non-Indians.

Williams v. Lee, 358 U.S. 217, 218, 223, 79 S.Ct. 269, 269, 273, 3 L.Ed.2d 251 (1958), held that the State of Arizona, which expressly disclaimed jurisdiction over Indian lands, did not have jurisdiction over an action brought by a non-Indian in state court to collect a debt against an Indian and his wife. At issue in *Williams* was whether the case should be heard in tribal or state court. In holding that the case must be heard in tribal court, *Williams* explained that state jurisdiction would interfere with essential tribal relations. In the present case, the choice is between federal court and state court, not between state and tribal court; although essential tribal relations may not be involved, essential Indian rights to water, basic to the survival of tribes, are certainly at stake. An observation in *Williams* is relevant to this case. "Through conquest and treaties [Indian tribes] were induced to give up complete independence and the right to go to war in exchange for federal protection, aid, and grants of land." *Id.* at 218, 79 S.Ct. at 269. Were the State to expressly disclaim jurisdiction and the federal

courts to give up their protective jurisdiction over Indian lands, including water rights, the Indians would seem deprived of the benefit of the original bargain that they were driven to make. Of course, by general statute, Congress later expressed its willingness to have any state assume jurisdiction over reservation Indians if the state legislature or the people voted affirmatively to accept such responsibility. *Id.* at 222, 79 S.Ct. at 271. To date, Montana does not appear to have accepted such responsibility.

In passing, we note that *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164, 179, 180, 93 S.Ct. 1257, 1266, 36 L.Ed.2d 129 (1972) (holding that Arizona could not impose an income tax on reservation Indians), has expressly limited the application of the *Williams* tribal self-government test to certain circumstances:

> It must be remembered that cases applying the *Williams* test have dealt principally with situations involving non-Indians. [citations omitted]. In these situations, both the tribe and the state could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.
>
> The problem posed by this case is compeletly different. Since appellant is an Indian and since her income is derived wholly from reservation sources, her activity is totally within the sphere which the relevant treaty and statutues leave for the Federal Government and for the Indians themselves. Appellee cites us to no cases holding that this legislation may be ignored simply because tribal self-government has not been infringed.

Similarly, in the present case, we do not believe that the enabling act, the Montana constitution, P.L. 280, and its 1968 amendment can be overlooked simply because tribal self-government has not been infringed. Unlike *Williams*, but like *McClanahan*, the present case is not one that pre-

sents as a central issue, a choice between tribal and state jurisdiction; therefore, the *Williams* test has no application whatsoever to the present situation.

Kake Village v. Egan, 369 U.S. 60, 75, 82 S.Ct. 562, 570, 7 L.Ed.2d 573 (1962), held that a disclaimer state could regulate the fishing of off-reservation Indians by enforcing against non-reservation Indians a state statute forbidding the use of salmon traps. Referring to *Kake*, *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274, 1280 (9th Cir. 1981), which held that a disclaimer state is not precluded from imposing fishing and hunting license fees on non-Indians on a reservation, noted that the enabling acts do not force states to disclaim governmental or regulatory authority over Indian lands. We believe that *Jicarilla*, *supra*, went too far by relying on the distinction between proprietary and governmental functions drawn in *Kake* and *White Mountain Apache Tribe*. All that the latter two cases recognize is that a state may have a strong governmental interest that empowers it to regulate certain limited conduct concerning non-reservation Indians or non-Indians on reservations. Neither *Kake* nor *White Mountain Apache Tribe* permits a state court to decide how much water reservation Indians may take for use on their reservations.

The present case is not about fishing traps or licenses. More is at stake here than the mere power of a state legislature to regulate the use of fishing traps, where the power to regulate may have a secondary effect on Indian fishing rights; instead, the right of Indians to the water itself is at issue. The power of a court in a disclaimer state to enforce a regulatory statute that may adversely affect Indians falls far short of the power to adjudicate a direct challenge to Indian water rights in and to the waters of streams. A disclaimer state cannot assert jurisdiction over such matters until Indian sovereign immunity has been waived and the state has repealed its disclaimer. Unless the state effectively repeals its disclaimer, it cannot hear this matter.

III. THE *AKIN* FACTORS.

Even if we were to find that Montana had validly repealed the disclaimer language in its constitution, we would nonetheless be compelled to reverse the decision below. The limited factual circumstances of *Akin* prevent its application to the Montana litigation. Noting the virtually unflagging obligation of the federal courts to retain jurisdiction, the *Akin* Court held that principles of "wise judicial administration," *Akin, supra,* at 817, 96 S.Ct. at 1246, required dismissal given the "exceptional circumstances" of that case. *Id.* at 818, 96 S.Ct. at 1246. In the instant case, no exceptional circumstances mandate dismissal in the exercise of wise judicial adminsitration.

The "exceptional circumstances" requiring dismissal in *Akin* included the following: Colorado had an extensive ongoing water plan in which the United States had participated. Colorado is not a disclaimer state. The federal government sued in federal court on behalf of several Indian tribes under 28 U.S.C. § 1345. During the pleading stage the federal court dismissed in favor of the ongoing state proceedings. The suit by the United States in federal court involved one small division of the state plan while the state proceeding was comprehensive. The Indians involved did not receive water rights by treaty. Nor did the Court find that the United States faced a conflict of interest in representing its various interests.

The Court noted in its decision (a) the apparent absence of any proceedings in the district court other than the filing of the complaint, (b) the extensive involvement of the state and state water rights, (c) the inconvenience of the federal forum's 300-mile distance from the location of the dispute and (d) the existing participation by the Government in the state proceeding. *Id.* at 820, 96 S.Ct. at 1247. Further, it noted that the federal forum must defer to the state where both have concurrent jurisdiction and the state action preceded the federal.

In limiting its holding, the Court stated: "[W]e do not overlook the heavy obligation to exercise jurisdiction. We need not decide . . . whether, despite the McCarran Amendment, dismissal would be warranted if more extensive proceedings had occurred, . . . if the involvement of state water rights were less extensive . . ., or if the state proceedings were in some respect inadequate to resolve the federal claims. . . .," *id.* at 820, 96 S.Ct. at 1247, or if the suit were "brought by a private party," *id.* at n.26. The Montana litigation is sufficiently different from that in *Akin* to require the district court to accept its "virtually unflagging obligation" to entertain jurisdiction.

Before considering the factors discussed in *Akin*, we note that under the heading "wise judicial administration," the district court included limited federal resources as a reason for leaving adjudication to the state courts. *Northern Cheyenne Tribe, supra,* at 36. It is a well established point, however, that conservation of federal judicial resources is not a proper reason for dismissing a case from the federal courts. An action properly filed in district court is not to be dismissed or referred to state court simply because the district court considers itself too busy to try the action. *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336, 344, 96 S.Ct. 584, 589, 46 L.Ed.2d 542 (1975). Shortages of judicial manpower are indeed unfortunate where they occur; however, it is not wise judicial administration for a federal court to shirk its responsibility to hear federal questions just because the court may not be able to dispatch the case as quickly as it may want to.

A. *Stage of the Proceedings.*

Akin involved a completed proceeding which had been in the adjudication process for years. Furthermore, the federal action in *Akin* involved only one section of the state; the United States was already a party in state proceedings in

other water divisions. Finally, *Akin* did not involve allegations that the United States would be subject to conflicts of interests in representing its varied interests along with tribal interests.

In contrast, the Montana state court litigation has not passed the notice stage. The comprehensive plan envisioned by Montana was not enacted until four years after the first federal suit was filed. Claims to all water rights under the plan will not be complete until 1982. In addition, though the federal litigation is no further along than the state litigation, the district courts stayed proceedings, apparently awaiting the state legislation.

B. *Comprehensiveness.*

Akin involved a truly comprehensive proceeding in state court with a concurrent piecemeal proceeding in federal court. Montana claims that a federal proceeding in the Montana case will be piecemeal because the federal courts have been unable to obtain jurisdiction over all defendants due to the in personam nature of the case. Further, Montana points out that the federal proceeding excludes the Missouri River and other important water bodies within the state. The federal action is limited to claims in which the United States owns a reserved water right. As to the actions that took place, the state claims that federal notice to affected parties was inadequate.

The Tribes counter that the state proceeding will be piecemeal because Indian allottees may not be joined. They also claim that the state proceeding is inadequate as it adjudicates only claims accruing after 1973 and excludes claims for livestock purposes. The state asserts that the exempted water rights involve a minimal amount of water. The district court does not explain the basis for its conclusion on the issue of comprehensiveness; nor did it make findings regarding the Tribes' claims.

The Tribes argue that even if all parties could be joined in the state proceeding, the federal court could adopt state joinder procedures and appoint special masters to implement the federal proceeding. They correctly stress that *Akin* only required dismissal where the federal proceeding would be piecemeal *and* the state proceeding is comprehensive. Where that is not the case and jurisdiction is concurrent, the federal court may not abdicate its judicial obligations.

C. *The Race to the Court.*

In *Akin*, state proceedings were ongoing when the federal action was filed. In Montana, the federal proceeding was the predecessor. This factor is not determinative, however, as both proceedings are in their infancy.

D. *Forum Non Conveniens.*

Akin relied on factors suggestive of a forum non conveniens analysis. Distance was a major consideration as the federal proceeding was 300 miles from the water district in question. The court relied on difficulty to the parties in travelling to the location. That factor is not present in this case to encourage dismissal.

E. *Conflicts of Interest.*

In any state litigation, the United States must represent the water rights of all tribes as well as those of the Bureau of Land Management, the U. S. Forest Service, and other federal entities. The United States and the Tribes argue that conflicts among these interests would prevent the United States from representing them adequately. When the United States is faced with such a conflict, its representation of Indians is inadequate. *Manygoats v. Kleppe*, 558 F.2d 556, 558 (9th Cir. 1972). Hence, the United States and the Tribes claim the Indians would be necessary parties over whom the state court has no jurisdiction.

The Tribes further argue that the result in *Akin* was limited to a situation in which the United States could effectively represent all of its diverse rights because of the limited scope of the proceeding. In contrast, the Montana litigation involves all water rights in the state. The McCarran Amendment is complied with only when the inclusion of the United States as a necessary party will provide complete adjudication of all issues. *Akin*, *supra*, at 819, 96 S.Ct. at 1247.

The state, relying on *Jicarilla*, argues that the Indians' right to intervene in court proceedings sufficiently protects their interests. However, we are reluctant to follow *Jicarilla* on this point for two reasons. First, it is unclear that the tribes have a right to intervene; if the state has disclaimed personal jurisdiction over the Indians, then they may not have that right. Whether the state disclaimer provisions reach so far is a question of state law that we need not and do not reach. Second, apart from any possible state disclaimer of personal jurisdiction, Indian tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers; without express waiver of sovereign immunity, an Indian tribe cannot be sued. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59, 98 S.Ct. 1670, 1676-1677, 56 L.Ed.2d 106 (1979). In the present case, the Indian tribe appears to be a necessary party to the state court proceeding, yet neither Congress nor the Tribe has consented to such a suit in state court. Under these circumstances, where the sovereign immunity of the Tribe has not been waived, and there is a conflict of interest between the Tribe and the United States, the Tribe could only protect its rights by intervening, at the expense of its basic right to sovereign immunity. We will not put the Tribe to this Hobson's choice.

Thus, the instant case is unlike the *Akin* case, in which the Tribe was not a necessary party and the United States, as trustee to the Indians' water rights, could apparently act as trustee without conflict of interest. Our examination of

this conflicts factor leads us to conclude that it would not be wise or appropriate for the federal court to give up its traditional jurisdiction and defer to the state court in this case.

F. *Jurisdiction under 28 U.S.C. § 1362.*

The Montana litigation involves petitions by Indian tribes pursuant to 28 U.S.C. § 1362. That section, enacted in 1966, authorizes suits by tribes in federal courts without the $10,000 amount in controversy requirement.

In *Akin*, the Supreme Court dismissed a suit brought by the federal government pursuant to 28 U.S.C. § 1345, authorizing the United States to sue in federal court. The Court declined to decide whether dismissal would have been appropriate had suit been brought by a private party. 424 U.S. at 820, n.26, 96 S.Ct. at 1247, n.26.

If this court were to further extend *Akin* in the Montana case to a suit brought by an Indian tribe, the result could prevent Indians from fully litigating their rights to water in federal court. Each time a tribe sued in federal court, the state need only join the United States as a party to obtain dismissal of the federal action. It is contrary to all reason to permit the states to frustrate federal jurisdiction merely by joining the United States as a party.

IV. CONCLUSION.

The Supreme Court has expressly and repeatedly noted the obligation of federal courts to retain jurisdiction in all but the most exceptional of circumstances.

The circumstances of the Montana litigation are sufficiently distinct from the factors warranting exceptional treatment in *Akin*. The conflicts of interest present, the embryonic stage of state and federal proceedings, and the procedural status of the Montana case favor retention of federal jurisdiction. Accordingly, we reverse.

V. THE CROW TRIBE APPEAL.

The Crow Tribe moved to intervene in the district court. The district court refused to rule on the motion, instead dismissing the action with the rest. To the extent that the court's action was a de facto denial of the motion, the tribe should be permitted to intervene in the interest of avoiding piecemeal litigation.

The judgment of the district court is REVERSED.

MERRILL, Circuit Judge, dissenting:

I dissent from the Court's holding that the disclaimer clauses in the Montana Statehood Act and in the State Constitution deprive the state courts of jurisdiction to establish and adjudicate reserved water rights of the United States held by it in trust for the Indians. On this issue I agree with *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116 (10th Cir.), *cert. denied*, 444 U.S. 995, 100 S.Ct. 530, 62 L.Ed.2d 426 (1979).

The disclaimer clauses disclaim all right and title to Indian lands. But no one here lays any claim to Indian lands or water rights. The Statehood Act disclaimer provides that Indian lands "shall be and remain subject to the disposition of the United States, and * * * shall remain under the absolute jurisdiction and control of the Congress of the United States." 25 Stat. 676 (1889). But no one here disputes that Congress has always had jurisdiction and control over land owned by the United States and held by it in trust for Indians and that such lands always remained subject to disposition by Congress. Indeed, in enacting the McCarran Amendment, 43 U.S.C. § 666, Congress Exercised its plenary control over Indian lands to authorize the states to adjudicate, as part of general stream adjudications, the federal reserved water rights of Indians. *See Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) ("*Akin*"). The sole question then, as I see it, is whether the language "absolute jurisdiction and control of the Congress" is to be construed to mean *exclusive* jurisdiction of the federal

courts in all suits involving Indian lands or property rights. In holding that that is not the meaning to be attributed to the language, *Jicarilla* followed *Organized Village of Kake v. Egan*, 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962), where the Supreme Court held to that effect.

In that case, under the Alaska Statehood Act, the United States retained "absolute jurisdiction and control" over Indian property. The property in question was Indian fishing rights and the issue was the right of Alaska to regulate the Indian use of salmon traps. Speaking for the Court, Justice Frankfurter concluded from the Court's decisions in *Williams v. Lee*, 358 U.S. 217, 220, 79 S.Ct. 269, 270, 3 L.Ed.2d 251 (1946), and *Draper v. United States*, 164 U.S. 240, 17 S.Ct. 107, 41 L.Ed. 419 (1896), that " 'absolute' federal jurisdiction is not invariably exclusive jurisdiction." 369 U.S. at 68, 82 S.Ct. at 567. "[A]n examination of past . . . decisions makes clear," he wrote, "that the words 'absolute jurisdiction and control' are not intended to oust the State completely from regulation of Indian 'property (including fishing rights).' " *Id.* at 71, 82 S.Ct. at 568. He concluded, "These decisions indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law." *Id.* at 75, 82 S.Ct. at 570.

To the same effect is this Court's recent decision in *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274 (9th Cir. 1981). We there cited the *Organized Village of Kake* and *Jicarilla* decisions for the proposition that the "Enabling Acts themselves forced states to disclaim only their proprietary interest in Indian land, not the states' governmental or regulatory authority over that land." 649 F.2d at 1280.

If the disclaimers are no bar to state regulation of Indian property rights where those rights confront legitimate state interests, the McCarran Amendment, as discussed in *Akin*, makes it clear that state courts are vested with jurisdiction in the adjudication of Indian water rights.

McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973), is not to the contrary. There, in holding that Arizona was without jurisdiction to impose on reservation Indians a tax on income derived from reservation sources, the Supreme Court described the tribal interest at issue as "totally within the sphere which the relevant treaty and statute leave for the Federal Government and for the Indians themselves." *Id.* at 179-180, 93 S.Ct. at 1266. Here, in stark contrast, the McCarran Amendment actually authorizes the states to adjudicate as part of comprehensive stream adjudications the federal reserved water rights of Indians. "The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights. . . ." *Akin, supra*, 424 U.S. at 819, 96 S.Ct. at 1247.

Further I dissent from the Court's holding that wise judicial administration, as that term is used in *Akin*, does not call for dismissal of the federal suits. The district court dealt at length with the special circumstances presented by this case, taking note of Montana's detailed water use legislation. *See* 484 F.Supp. at 35–36. Pursuant to that legislation, the Montana Supreme Court has filed an order requiring all persons claiming a water right within the state to file a statement of that claim with the State Department of Natural Resources and Conservation. These claims will be referred to water judges appointed in each of the state's four water divisions who shall enter a preliminary, and after an opportunity for hearing, a final comprehensive water decree.

The district court concluded:

> It is clear that the adjudication contemplated by the Bill is both comprehensive and efficient. As the general adjudication has been initiated by recent order of the Montana Supreme Court, it would seem that the greater wisdom lies in following *Colorado River*, and, on the basis of wise judicial administration, deferring to the comprehensive state proceedings. The federal proceedings are all in their infancy; service of process has been but recently completed. The state adjudication is thorough, as opposed to the piecemeal proceedings initiated by the Government. There is no jurisdictional question preliminarily attending the state adjudication; all such questions have been eliminated by the McCarran Amendment. The state forum will likely be more convenient, geographically, than the federal forum. The amount of time contemplated for completion of the state adjudication is significantly less than would be necessary for federal adjudication, insofar as the state has provided a special court system solely devoted to water rights adjudication. The federal judicial resources in Montana are limited; continued exercise of federal jurisdiction over the pending adjudications would either exhaust or severely deplete those resources for a substantial number of years, just by virtue of the number of parties involved. (In these cases, there are approximately 9,000 defendants.) The possibility of conflicting adjudications by the concurrent forums also looms large and could be partially avoided only by staying the pending state adjudication, an action *Colorado River* has intimated is distinctly repugnant to a clear state policy and purpose.

484 F.Supp. at 36. Accordingly, "on the basis of wise judicial administration, giving regard to conservation of judicial resources and comprehensive dispostition of litigation," the court ordered the cases dismissed. *Id.*

I agree with the district court. Water adjudication is essentially a local concern, and in every western state water scarcity poses a problem not just to Indians but to everyone. In my view, it is highly important that each state be accorded room for an effort to solve its water scarcity problem in the manner it regards as most appropriate. Here so long as Montana gives recognition to Indian water rights and their establishment pursuant to federal law, I see no good reason why Indians should not be joined with all other water users in the state in order to achieve a comprehensive state adjudication.

I would affirm.

APPENDIX D

Filed APRIL 17, 1980

NAVAJO NATION, aka The Navajo Tribe of Indians,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA; The State of Arizona, et al

Defendant.

No. CIV 79-276 PCT. VAC

This matter having been under advisement, IT IS ORDERED denying defendant State of Arizona's Motion to Dismiss; and

IT IS FURTHER ORDERED staying these proceedings pending the trial and determination by the State Court of Arizona of the rights of claimants, over which it has jurisdiction, to the water of the Little Colorado Watershed.

/s/ VALDEMAR A. CORDOVA

UNITED STATES DISTRICT JUDGE

APPENDIX E

FILED
JAN. 18, 1980
W. J. FURSTENAU, CLERK
UNITED STATES DISTRICT
COURT
FOR THE DISTRICT OF
ARIZONA

BY_____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

IN THE MATTER OF THE DETERMINATION OF CONFLICTING RIGHTS TO THE USE OF WATER FROM THE SALT RIVER ABOVE GRANITE REEF DAM AND ITS TRIBUTARIES INCLUDING TONTO CREEK, EXCLUDING THE VERDE RIVER AND ITS TRIBUTARIES. SALT RIVER VALLEY WATER USERS' ASSOCIATION, PETITIONER.	CIV 79-182 PHX VAC

IN THE MATTER OF THE DETERMINATION OF CONFLICTING RIGHTS TO THE USE OF WATER FROM THE SALT RIVER ABOVE GRANITE REEF DAM AND ITS TRIBUTARIES INCLUDING TONTO CREEK, EXCLUDING THE VERDE RIVER AND ITS TRIBUTARIES. SALT RIVER VALLEY WATER USERS' ASSOCIATION, PETITIONER.	CIV 79-183 PHX VAC

IN THE MATTER OF THE DETERMINATION OF CONFLICTING RIGHTS TO THE USE OF WATER FROM THE SALT RIVER ABOVE GRANITE REEF DAM AND ITS TRIBUTARIES INCLUDING TONTO CREEK, EXCLUDING THE VERDE RIVER AND ITS TRIBUTARIES. SALT RIVER VALLEY WATER USERS' ASSOCIATION, PETITIONER.	CIV 79-184 PHX VAC

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, Plaintiff, v. THE STATE OF ARIZONA and JOHN M. LITTLE, Acting Commissioner of the Arizona State Land Department, Defendants.	CIV 79-185 PHX VAC

SAN CARLOS APACHE TRIBE OF ARIZONA,

Plaintiff,

v.

THE STATE OF ARIZONA, a body politic;

and

THE STATE LAND DEPARTMENT OF THE STATE OF ARIZONA;

and

JOHN M. LITTLE, individually and as Acting Commissioner of the State Land Department of the State of Arizona;

and

SALT RIVER VALLEY WATER USERS' ASSOCIATION, an Arizona corporation,

Defendants.

CIV 79-186
PHX VAC

PAYSON COMMUNITY OF YAVAPAI-APACHE INDIANS,

Plaintiff,

v.

THE STATE OF ARIZONA, a body politic;

and

THE STATE LAND DEPARTMENT OF THE STATE OF ARIZONA;

and

JOHN M. LITTLE, individually and as Acting Commissioner of the State Land Department of the State of Arizona;

and

SALT RIVER VALLEY WATER USERS' ASSOCIATION, an Arizona corporation,

Defendants.

CIV 79-187 PHX VAC

FORT McDOWELL MOHAVE-APACHE INDIAN COMMUNITY, for and on behalf of itself and its members,

Plaintiff,

v.

SALT RIVER VALLEY WATER USERS' ASSOCIATION; SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT; CITY OF PHOENIX; CITY OF PRESCOTT; CITY OF JEROME; PHELPS DODGE CORPORATION; PHELPS DODGE INDUSTRIES, INC.; ARIZONA WATER COMPANY; MILLER BROTHERS FARMS, INC.; CAMP VERDE WATER SYSTEMS; COTTONWOOD WATER WORKS, INC.; COPPER BASIN WATER CO.; V BAR V CATTLE CO., INC.; HAROLD W. BULLARD; and THE STATE OF ARIZONA, individually and as representative of a class composed of all others similarly situated,

Defendants.

CIV 79-267 PHX VAC

OPINION AND ORDER

The matters now before this Court are the defendants' motions to dismiss (nos. CIV 79-185, 79-189, 79-187 and 79-267) and the defendants' motions to remand (nos. CIV 79-182, 79-183 and 79-184). These actions, generally, request a declaration of rights to the water of several water systems in the State of Arizona.

The central question presented by these cases is whether this Court should remand these cases to the State court in light of the McCarran Amendment, 66 Stat. 560, 43 U.S.C. § 666 and the decision of the Supreme Court in *Colorado*

River Water Conservation District v. United States, 424 U.S. 880 (1976) (hereinafter referred to as "Akin"). Also, whether dismissal is warranted, where proper, in light of considerations of "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation". *Kerotest Mfg. Co. v. C-O-Two Five Equipment Co.*, 342 U.S. 180, 183 (1952) as quoted by the Court in *Akin, supra.*

The McCarran Amendment, 66 Stat. 560, 43 U.S.C. § 666[1] provides that "consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of water rights to the use of water of a river system or other source, or (2) for the administration of such rights where it appears that the United States is the owner of or is

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[1] 43 U.S.C. Sec. 666 reads as follows:

"§ 666. SUITS FOR ADJUDICATION OF WATER RIGHTS — JOINDER OF UNITED STATES AS DEFENDANT; COSTS.

(a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances; PROVIDED that no judgment for costs shall be entered against the United States in any such suit.

SERVICE OF SUMMONS

(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

JOINDER IN SUITS INVOLVING USE OF INTERSTATE STREAMS BY STATE

(c) Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream. July 10, 1952, c. 651, Title II, § 208(a) - (c), 66 Stat. 560.

in the process of acquiring water rights by appropriation under state law by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit."

First, the Court notes that the McCarran Amendment in no way diminishes federal district court jurisdiction under Title 28, United States Code Sections 1331 and 1362, but rather that "[t]he immediate effect of the Amendment is to give consent to jurisdiction in the State courts concurrent with jurisdiction in the Federal courts over controversies involving federal rights to the use of water." *Akin*, 424 U.S. at 809.

This Court agrees with *Akin* that the McCarran Amendment is to be construed as reaching federal water rights on behalf of Indians and that mere subjection of Indian rights to legal challenge in State court would not imperil those rights. *Akin*, 424 U.S. at 812.

The various Indian Tribes in this case contend that considerations of wise judicial administration and the factors enumerated in *Akin* do not dictate that the present cases be adjudicated in the State courts.

The Court in *Akin*, in concluding that "considerations of wise judicial administration" required that the action be dismissed stated the following:

> "Turning to the present case, a number of factors clearly counsel against concurrent federal proceedings. The most important of these is the McCarran Amendment itself. The clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system. This policy is akin to that underlying the rule requiring that jurisdiction be yielded to the court first acquiring control of property, for the concern in such instances is with avoiding the generation of additional litigation through permitting inconsistent disposition of property. This concern is heightened with respect to water rights, the relationships among which are highly interdependent. Indeed, we have recognized that actions seeking the allocation

> of water essentially involve the disposition of property and are best conducted in unified proceedings. See *Pacific Livestock Co. v. Oregon Water Bd.* [241 U.S. 440] at 449. The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals." *Id* at 819.

A.R.S. § 45-231 *et seq.*, under which the State actions have been brought set forth a comprehensive scheme for the determination of conflicting water rights leading to a State court decree adjudicating the respective water rights. These State proceedings, as the Colorado water rights proceedings, reach "all claims, perhaps month by month, but inclusively in the totality". *United States v. District Court In and For Water Div. No. 5.*, 401 U.S. 527, 529 (1971), quoted by the Court in *Akin*, 424 U.S. at 820.

Beyond the Congressional policy expressed by the McCarran Amendment, the Court noted that the "apparent absence of proceedings in the District Court other than filing of the complaint, prior to the motion to dismiss" and "the extensive involvement of State water rights occasioned by this suit naming 1000 defendants" were significant factors consistent with the policy underlying the enactment of the McCarran Amendment. Both these factors are present in the cases now before this Court.

The tribes contend that the following footnote in *Akin* precludes dismissal or remand to the State courts of these actions:

> "Whether similar considerations would permit dismissal of a water suit brought by a private party in federal district court is a question we need not now decide."

It is true that *Akin* is distinguishable from the present cases in that there the United States had filed the action in the Federal District Court. However, this Court is of the opinion that in the present case there is no practical dis-

tinction between an action filed by the Government and one filed by these tribes where these same parties' rights will be fully adjudicated in the McCarran Amendment proceedings in the State courts. To hold otherwise would be to undermine the policy against piecemeal adjudication underlying the McCarran Amendment by finding that a mere substitution of the name of one party for the other would change the result.

The tribes contend that *Akin* is further distinguishable for the reason that *Akin* arose out of Colorado, and Colorado does not have a "disclaimer clause" in its enabling act and its State Constitution. The Arizona Constitution, however, contains such a clause, (Ariz. Const., Art. 20, Par. 4, A.R.S.)[2] and the disclaimer language of the Arizona Constitution is substantially duplicative of that in the Arizona Enabling Act (36 Stat. 369).[3]

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[2] Arizona Constitution, Article 20, Paragraph 4 reads:

"FOURTH. PUBLIC LANDS; INDIAN LANDS.

Fourth. The people inhabiting this State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.

[3] The Arizona Enabling Act (36 Stat. 569) reads in part:

Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States;

. . .

The tribes maintain that the language of these disclaimer provisions prohibit state jurisdiction. This Court rejects this contention and cites *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116, (10th Cir.), *cert. denied* 48 USLW 3383(Dec. 11, 1979) with approval. In *Jicarilla*, the Court held that the New Mexico disclaimer provision did not serve as a bar to New Mexico's adjudication of the federal water rights in the Gila National Forest.

The New Mexico disclaimer provision, like the Arizona disclaimer provisions, applies to Indian lands and the "unappropriated and ungranted public lands being within the boundaries thereof." This Court agrees with the statement in *Jicarilla* that "in view of the McCarran Amendment and the strong policy behind it outlined in the Colorado River opinion of the Supreme Court we feel that subject matter jurisdiction should be recognized as allowable in the State courts of general water rights adjudication proceedings, there being implicit modification of the Enabling Act to that extent, as necessary." (601 F.2d at 1131). Nine states, the majority of which are Western states, have disclaimer clauses. In the Senate hearings on the Amendment, participants for the Department of Justice and the Department of the Interior made clear that the proposal would include water rights reserved on behalf of Indians. *Akin, supra*, at 811-812. Furthermore, the McCarran Amendment appears to have been intended to be utilized primarily in the Western states. See S.B. 755, 82.d Cong., 1st Sess. (1951), and Hearings on S.18 before the Subcommittee of the Senate Committee on the Judiciary in the United States Senate, 82nd Cong., 1st Sess. p. 7 (1951). To hold now that the Arizona disclaimer clauses and similar clauses contained in the enabling acts of six other Western states bar general water rights adjudications in the State court would defeat the Amendment's objective.

The tribes further contend that the State adjudication proceeding is not a McCarran Amendment proceeding because the Arizona water rights determination law deliberately excludes non-Indian users of percolating groundwater.

Certain types of groundwater are subject to the doctrine of prior appropriation in Arizona, and the Arizona statutory adjudication scheme recognizes these appropriable rights. First, Sec. 45-101(A) of the Arizona Revised Statutes defines appropriable water as:

> "The waters of all sources, flowing in streams, canyons, ravines or other material channels, *or in definite underground channels,* whether perennial or intermittent, flood, waste or surplus water, and of lakes, ponds and springs on the surface, belong to the public and are subject to appropriation and beneficial use as provided in this chapter." (emphasis added)

In addition to this section, the Arizona Supreme Court has held two classes of subterranean waters to be public waters and, therefore, subject to the doctrine of prior appropriation:

(1) the subflow of surface streams or rivers; and

(2) underground streams flowing in defined underground channels with definite banks.

Maricopa County Municipal Water Conservation District No. 1 v. Southwest Cotton Co., 39 Ariz. 65, 4 P.2d 369 (1931).

The class of subterranean water commonly referred to as "percolating groundwater" is not public water and is not appropriable under Arizona state law. The Arizona Supreme Court has defined percolating groundwater as:

> "[F]iltrating or percolating water oozing through the soil beneath the surface in undefined and unknown channels, and therefore a component part of the earth, having no characteristic of ownership distinct from the land itself. *Howard v. Perrin*, 8 Ariz. 347, 353, 76 P. 460, 462 (1904)., aff'd 200 U.S. 71 (1906)."

Percolating water under Arizona law is owned by the owner of the land under which it lies. *Bristor v. Cheatham*, 75 Ariz. 227, 255 P.2d 173 (1953). Thus, there is no priority date aspect to the right to the use of percolating groundwater. In short, percolating groundwater rights are not relative rights; instead, each landowner is entitled to the reasonable use of percolating groundwater underlying his land.

The federal water rights claimed by the tribes arose from the judicial doctrine of federal reserved water rights first enumerated in *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207 (1908). The essence of the federal reserved rights doctrine, as the Supreme Court observed in *Cappaert v. United States*, 426 U.S. 128, 96 S.Ct. 2062 (1976) is that:

> "[W]hen the Federal Government withdraws its lands from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators." *Id* at 138, 96 S.Ct. at 2069.

The Supreme Court in *Cappaert* further stated that the "United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater". 426 U.S. at 143, 96 S.Ct. at 2071.

Section 45-251(5), Arizona Revised Statutes, which effectively sets forth the scope of the State proceedings, defines the phrase "river system and source" as [A]ll water appropriable under [A.R.S.] Section 45-101 and all water subject to claims based upon federal law."

Thus, the State proceedings will determine federal reserved water rights (including federal reserved rights to percolating groundwater) and rights to water appropriable under State law. The only water rights excluded from the State proceeding are those rights to percolating groundwater arising solely under existing Arizona case law. (See *Bristor v. Cheatham, supra*).

With the foregoing in mind, this Court now turns to the issue of whether the State proceedings qualify as a McCarran Amendment proceeding.

The McCarran Amendment applies to the adjudication and administration of "rights to the use of water of a river system or other source". The State proceedings encompass all water appropriable under State and Federal Law. Whether these causes remain in this Court for determination or are left for determination in the State courts, the applicable law will be the same. Those rights which are State created will be determined by State law and Federal law will be applied to determine those rights which derive from Federal law. It is difficult, therefore, to imagine how the State proceedings could be considered as anything less than a general adjudication of water rights.

We must keep in mind and this Court further notes that water is a most valuable natural resource in the southwestern part of the nation. The State and the people residing within the State depend upon water for their very existence and they have the most important interest in the determination of the State water rights. Congress in enacting the McCarran Amendment appears to have recognized the intense local concern in proceedings for the determination of State water rights and acted in respect thereto by allowing for a more effective and complete determination of water

rights in the State courts. This Court is compelled toward the opinion that the intense local concern in actions of the present type weigh heavily in favor of the exercise of federal judicial restraint and nonintervention.

In light of considerations of federal judicial restraint in State matters and judicial administration, further giving regard to the conservation of judicial resources and the comprehensive disposition of litigation, this Court finds that those actions originally brought in the State Land Department of the State of Arizona and then removed to this Court from the State courts be remanded to the State courts for further proceedings. The Court further finds that those actions originally filed in this Court requesting declaratory and injunctive relief be dismissed without prejudice.

THEREFORE, IT IS ORDERED AS FOLLOWS:

Salt River Valley Water Users' Association v. White Mountain Apache Tribe (CIV 79-182); Salt River Valley Water Users' Association v. Gila River Indian Community (CIV 79-183); Salt River Valley Water Users' Association v. Salt River Pima Maricopa Indian Community (CIV 79-184) are hereby remanded to the State courts for all further proceedings.

Salt River Pima-Maricopa Indian Community v. The State of Arizona (CIV 79-185); San Carlos Apache Tribe of Indians v. State of Arizona (CIV 79-186); and Payson Community of Yavapai-Apache Indians v. The State of Arizona (CIV 79-187) are hereby dismissed without prejudice.

Fort McDowell Mohave-Apache Indian Community v. Salt River Valley Water Users' Association (CIV 79-267) is hereby dismissed without prejudice. With regard to plaintiff's second cause of action, this Court is of the opinion that no action for damages can be entertained until the State has established the parties' rights to the water of the Verde River Watershed.

DONE IN OPEN COURT this 15th day of January, 1980.

/s/ VALDEMAR A. CORDOVA

APPENDIX F

Calendar No. 711

82D CONGRESS *1st Session*	SENATE	REPORT No. 755

AUTHORIZING SUITS AGAINST THE UNITED STATES TO ADJUDICATE AND ADMINISTER WATER RIGHTS

SEPTEMBER 17 (legislative day, SEPTEMBER 13), 1951.— Ordered to be printed

Mr. MCCARRAN, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 18]

The Committee on the Judiciary, to which was referred the bill (S. 18) to authorize suits against the United States to adjudicate and administer water rights, having considered the same, reports favorably thereon, with amendments, and recommends that the bill, as amended, do pass.

AMENDMENTS

1. On page 1, strike out all that follows the colon in line 10 down to and including line 1, on page 2, and insert in lieu thereof the following:

> *Provided*, That nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of water of any interstate stream. When the United States shall be a party to any such suit it shall be deemed to have waived any right to plead that the State laws are not applicable, or that the United States is not amenable thereto, by reason of the sovereignty of the United States, and the United States shall be subject to the judgments, orders, and decrees of the court having ju-

risdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided,*

2. At the end of the bill add the following new section:

SEC. 2. The head of every department or agency of the United States and of every corporation which is wholly owned by the United States shall, within two years from the effective date of this Act, cause to be filed with the Secretary of the Interior, in such form and detail as he shall prescribe, a complete list of all claims of right to the use by that department, agency, or corporation of the waters of any stream or other body of surface water in the United States for agricultural, silvicultural, horticultural, stock-water, municipal, domestic, industrial, mining, or military purposes, or the protection, cultivation, and propagation of fish and wildlife, or any other purpose involving a consumptive use of water, or for the production of hydroelectric or other power or energy. Said list shall be supplemented and revised promptly as new claims of right are made and existing claims are abandoned or otherwise disposed of. A catalogue of such claims shall be maintained by the Secretary and, except for items therein which are certified by the head of the claimant department, agency, or corporation to be of such importance to the national defense as to require secrecy, shall be open to inspection by the public and, subject to the same exception, copies thereof and of items therein shall be furnished by the Secretary upon payment of the cost thereof. The Secretary may make rules and regulations to carry out the purpose of this section.

PURPOSE

The purpose of the proposed legislation, as amended, is to permit the joinder of the United States as a party defendant in any suit for the adjudication of rights to the use of water of a river system or other source or for the administration of such rights where it appears that the United States is the owner or is in the process of acquiring water

rights by appropriation under State law, by purchase, exchange, or otherwise and that the United States is a necessary party to such suit.

STATEMENT

Hearings were held on S. 18, and the committee is of the opinion that in order to understand the background of this legislation a résumé of some of the history and decisions relating to the law of water rights would be of help.

The committee has taken note of the reports of the Department of Justice and the Department of the Interior printed below which oppose the legislation, but has concluded, after a consideration of all of the evidence available to the committee, that the legislation is meritorious.

There are two established doctrines relating to the law of water rights as it is applied in the United States today. The first is the riparian doctrine, which was inherited from England, and the second is the prior appropriation doctrine, which is founded in the customs and practices of the settlers and is uniformly recognized in the law of most of the western states.

The reason that there have been two doctrines lies in the volume of water which is available to particular sections of the country. The riparian doctrine generally has currency in localities where water is plentiful, and the prior appropriation doctrine is adhered to in those areas where water is at a premium. Under the riparian doctrine, the owner of land contiguous to a stream has certain rights in the flow of the water by reason of his ownership of land. Under the doctrine of prior appropriation the first user of the water acquires a priority right to continue the use, and the contiguity of land to the watercourse is not a factor. It can readily be seen that the western states are the ones which are susceptible to the doctrine of prior appropriation.

It will follow that the adjudication of water rights which might involve the United States would in most instances be confined to those states in which the doctrine of prior appropriation is applicable.

The doctrine of prior appropriation had its inception in the Western-States early in the settlement of the West, being brought about by the arid and semi-arid character of such States. The doctrine that "first in time is first in right" to the beneficial use of the water in the streams of such States first became the law of appropriation by custom and was later sanctioned by constitutional and legislative enactment in 11 of the Western States. Under the law sanctioning the doctrine of "first in time is first in right," vast quantities of land in these States, beginning back in the territorial days, was brought under cultivation through the courage and hard work of those who homesteaded or otherwise secured farm and ranch lands and made appropriations of water with which to make such lands productive. Litigation with respect to the water rights developed early in the history of the right to the use of water by appropriation. Down through the years the courts of the respective States marked out the pathway whereby order was instituted in lieu of chaos. Rights were established, and all of this at the expense, trial, and labor of the pioneers of the West, without material aid from our United States Government until a much later time when irrigation projects were initiated by Congress through the Department of the Interior and later the Bureau of Reclamation. Even then Congress was most careful not to upset, in any way, the irrigation and water laws of the Western States. In 1902 Congress wrote into the Federal Reclamation Act a strict admonition to the Secretary of the Interior. Section 8 of that act, being now section 383, title 43, United States Code, is in effect as follows:

> **Vested rights and State laws unaffected.** —Nothing in this chapter shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the

control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this chapter, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or any landowner, appropriator, or user of water in, to or from any interstate stream or the waters thereof.

It will be seen that in the Western States irrigation of the lands is essential to successful farming and ranching and failure by a landowner to receive the amount of water vested or adjudicated to him is likely to be fatal to his economic welfare.

In the arid Western States, for more than 80 years, the law has been that the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof.

In 1877 the Congress, in the Desert Land Act of 1877 (19 Stat. L. 377, Ch. 107), severed the water from the land, and the effect of such statute was thereafter that the land should be patented by the United States separate and apart from the water and that all the nonnavigable water should be reserved for the use of the public under the laws of the States and Territories named in the act. This statute was construed by the Supreme Court of the United States in *California-Oregon Power Co. v. Beaver Portland Cement Co.* (295 U.S. 142), in which the Court, inter alia, held:

1. Following the Desert Land Act of 1877, if not before, all non-navigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated States, including those since

created out of territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect to riparian rights should obtain.

2. The terms of the statute, thus construed, must be read into every patent thereafter issued, with the same force as though expressly incorporated therein, with the result that the grantee will take the legal title to the land conveyed, and such title, and only such title, to the flowing waters thereon as shall be fixed or acknowledged by the customs, laws, and judicial decisions of the State of their location.

3. The effect of the statute was to sever all waters upon the public domain, not theretofore appropriated, from the land itself, and that a patent issued thereafter for lands in a desert-land State or Territory, under any of the land laws of the United States, carried with it, of its own force, no common-law right to the water flowing through or bordering upon the lands conveyed.

In the course of its opinion the Court said:

The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the States and Territories named. The words that the water of all sources of water supply upon the public lands and not navigable "shall remain and be held free for the appropriation and use of the public" are not suceptible of any other construction. The only exception made is that in favor of existing rights; and the only rule spoken of is that of appropriation. It is hard to see how a more definite intention to sever the land and water could be evinced.

The Court further stated:

> Nothing we have said is meant to suggest that the act, as we construe it, has the effect of curtailing the power of the States affected to legislate in respect of waters and water rights as they deem wise in the public interest. What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated States, including those since created out of the Territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common law rule in respect of riparian rights should obtain. For since Congress cannot enforce either rule upon any State, *Kansas v. Colorado* (206 U.S. 46, 94), the full power of choice must remain with the State.

It is interesting to note what the Court said in a marginal note on page 164 of the opinion:

> In this connection it is not without significance that Congress, since the passage of the Desert Land Act, has repeatedly recognized the supremacy of State law in respect to the acquisition of water for the reclamation of public lands of the United States and lands of its Indian wards.

The effect and authority of the foregoing cited case was later followed by the Supreme Court in *Ickes v. Fox* (300 U.S. 82), decided February 1, 1937, wherein the Court said, at page 95.

> The Federal Government, as owner of the public domain, had the power to dispose of the land and water composing it together or separately; and by the Desert Land Act of 1877 (c. 107, 19 Stat. 377), if not before, Congress had severed the land and waters constituting the public domain and established the rule that for the future the lands should be patented separately. Acquisition of the Government title to a parcel of land was not to carry with it a water right; but all non-navigable waters were reserved for the use of the public under the laws of the various arid-land States. *California Power Co. v. Beaver Cement Co.* (295 U.S.

142, 162). And in those States, generally, including the State of Washington, it long has been established law that the right to the use of water can be acquired only by prior appropriation for a beneficial use; and that such right when thus obtained is a property right, which, when acquired for irrigation, becomes, by State law and here by express provision of the Reclamation Act as well, part and parcel of the land upon which it is applied.

It is therefore settled that in the arid Western States the law of appropriation is the law governing the right to acquire, use, administer and protect the public waters as provided in each such State.

It is most clear that where water rights have been adjudicated by a court and its final decree entered, or where such rights are in the course of adjudication by a court, the court adjudicating or having adjudicated such rights is the court possessing the jurisdiction to enter its orders and decrees with respect thereto and thereafter to enforce the same by appropriate proceedings. In the administration of and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts. Unless Congress has removed such immunity by statutory enactment, the bar of immunity from suit still remains and any judgment or decree of the State court is ineffective as to the water right

held by the United States. Congress has not removed the bar of immunity even in its own courts in suits wherein water rights acquired under State law are drawn in question. The bill (S. 18) was introduced for the very purpose of correcting this situation and the evils growing out of such immunity.

The committee believes that such a situation cannot help but result in a chaotic condition. Each water user under some State laws is required to pay a graduated fee or tax annually for the services of water commissioners. The commissioners must apportion the water to the decreed users thereof in accordance with their decreed rights, and are required to deny the use of water to any user who at a particular time is not in the priority for the available supply of water. Failure to comply with the lawful orders of the water commissioner subjects the offender to the administrative and penal orders of the court, usually issued in contempt proceedings. If a water user possessing a decreed water right is immune from suits and proceedings in the courts for the enforcement of valid decrees, then the years of building the water laws of the Western States in the earnest endeavor of their proponents to effect honest, fair and equitable division of the public waters will be seriously jeopardized.

If such a condition is to continue in the future it will result in a throw-back to the conditions that brought about the enactment of the statutory water laws, i. e., the necessity that the public waters so necessary to the economic welfare of the arid States be allotted in as equitable manner as possible to all users of the available supply thereof. It is said of such laws by the Supreme Court in the case of *Pacific Live Stock Co. v. Oregon Water Board* (241 U.S. 447):

> * * * All claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim, and all have the same relation to the proceeding. It is intended to be universal and to result in a complete ascertainment of all existing rights, to the end, first, that the waters may be distributed, under public

supervision, among the lawful claimants according to their respective rights without needless waste or controversy; second, that the rights of all may be evidenced by appropriate certificates and public records, always readily accessible, and may not be dependent upon the testimony of witnesses with its recognized infirmities and uncertainties; and, third, that the amount of surplus or unclaimed water, if any, may be ascertained and rendered available to intending appropriators.

The committee is aware of the fact, as shown by the hearings, that the United States Government has acquired many lands and water rights in States that have the doctrine of prior appropriation. When these lands and water rights were acquired from the individuals the Government obtained no better rights than had the persons from whom the rights were obtained.

Since it is clear that the States have the control of the water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years.

It will be noted that the amendment to S. 18 provides that nothing in the act shall authorize the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream. This is done in order not to open up any controversies between the States as to water rights on an interstate stream by permitting the United States to be made a party thereto.

The committee is of the opinion that there is no valid reason why the United States should not be required to join in a proceeding when it is a necessary party and to be required to abide by the decisions of the Court in the same manner as if it were a private individual.

Senator Magnuson raised the question as to whether S. 18 could be used for the purpose of delaying or blocking a multiple-purpose development such as proposed for the Hells Canyon project on the Snake River in the Columbia Basin or other similar projects, stating that there was a possibility of an individual or group having water rights on that stream bringing suits to adjudicate their respective rights and therefore preventing the Bureau of Reclamation from going ahead with the Hells Canyon project while litigation is in process or pending. The committee, for the legislative history of this bill, definitely desires to repudiate any such intent which may be deduced from S. 18 and states that this is not the purpose and the intent of this legislation. Where reclamation projects have been authorized for the benefit of the water users and the public generally, they should proceed under the law as it exists at the present time and should the Government have reason to need the water of any particular user on a stream, that water should be obtained by condemnation proceedings as is already provided for by law. The committee can think of no particular reason why the mere development of a project should be delayed or stopped by the passage of S. 18 and it is not so intended. An exchange of letters by Senator Magnuson and Senator McCarran dealing with this feature of the bill is hereto attached and made a part of this report.

Senator Magnuson also submitted an amendment to the bill which appears as section 2 of the bill. It requires the head of each department or agency of the United States and every corporation which is wholly owned by the United States to submit within a 2-year period of time to the Secretary of the Interior a complete list of all claims of right to use any stream or body of surface water in the United States. This list shall be supplemented properly as new claims and rights are made or other claims are abandoned or otherwise disposed of. A catalog of such claims is to be

maintained by the Secretary, which shall be open to the public inspection, except when they may be barred from such inspection by reason of secrecy required by national defense.

The committee is of the opinion that development of a catalog of this nature would be most salutary and that there should be a single depository where the water rights claims of the United States should be available for whatever purpose may be needed. This provision is not only helpful to all of the landowners who may be interested in the water rights of a particular stream but is exceedingly helpful to the United States in knowning where and how it can, on short notice, determine its holdings in this respect. This is a provision the committee believes should have been in force and effect long before now and believes that it will prove most helpful in the future administration and adjudication on questions of water rights, to say nothing of the incidental uses to which such a catalog may be made.

The committee, therefore, recommends that the bill S. 18, as amended, be considered favorably.

DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, August 3, 1951.

HON. PAT MCCARRAN,
Chairman, Committe on the Judiciary,
United States Senate, Washington, D.C.

MY DEAR SENATOR: The Department of Justice is unable to recommend the enactment of the bill (S. 18) to authorize suits against the United States to adjudicate and administer water rights.

This measure would permit the joinder of the United States as a defendant in any suit for the adjudication of rights to the use of water of a river system or other source or for the administration of such rights where it appears that the United States is the owner or is in the process of acquiring water rights and is a necessary party to such suit.

It would also provide that the United States could effect the removal to the Federal court of any such suit in which it is a party and that no judgment for costs shall be entered against the United States in any such suit. The last provision of the bill would authorize the service of summons or other process in any such suit upon the Attorney General or his designated representative.

The general waiver of the immunity of the United States to suits involving water rights would seem objectionable. It is likely that such a general waiver would result in the piecemeal adjudication of water rights, in turn resulting in a multiplicity of actions, and the joinder of the United States in many actions in all of which it would be required to claim every right, which it could conceivably have or need, or subject itself to the possible loss of valuable rights on the theory of having split its cause of action. There is, moreover, no reason to believe that in any instance in which it is desirable to do so, Congress would fail to authorize making the United States a party defendant in the litigation of water rights.

The Director of the Bureau of the Budget has advised this office that there would be no objection to the submission of this report.

Yours sincerely,

PEYTON FORD,
Deputy Attorney General.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington 25, D.C., August 3, 1951.

HON. PAT MCCARRAN,
Chairman, Committee on the Judiciary,
United States Senate, Washington 25, D.C.

MY DEAR SENATOR MCCARRAN: Reference is made to your request of April 27 for the views of this Department on S. 18, a bill to authorize suits against the United States to adjudicate and administer water rights.

I recommend that the bill not be enacted.

While there are some circumstances covered by the bill in which the relief which it would afford litigants may well be warranted, there are many others where it is more fitting that litigants be required to pursue their remedies under the Tort Claims Act or the Tucker Act.

The interests of the United States in the use of the waters of its river systems are so many and so varied that a full enumeration of them could not be made without a great deal of careful study. It is enough, I hope, for present purposes to exemplify these interests by pointing to those which it has under the commerce clauses of the Constitution; those which exist by virtue of the creation of Indian reservations under the doctrine of *United States v. Winters* (207 U.S. 564 (1908)) or by virtue of the creation of; for instance, a national park; those which it has asserted by entering into international treaties; those which it may have by virtue of its present and prior ownership of the public domain and which have not vested under the acts of July 26, 1866 (14 Stat. 253, 43 U.S.C. 661), July 9, 1870 (16 Stat. 218, 43 U.S.C. 661), and March 3, 1877 (19 Stat. 377, 43 U.S.C. 321); those with respect to which its officers and employees have followed the procedure prescribed in section 8 of the act of June 17, 1902 (32 Stat. 388, 43 U.S.C. 383); and those which it has acquired by purchase, gift, or condemnation from private owners. Since the United States can be said, with varying degrees of accuracy, to be the

"owner" of rights of any or all these types, it is clear to me that enactment of the bill could lead to a tremendous volume of unwarranted litigation and, in the absence of a complete and detailed catalogue of all the rights and interests which the United States has in the stream systems of the Nation, to the hazard that, by overlooking some, it would be forever precluded from asserting them thereafter.

The brief exemplication of some of the types of interests given above does, however, suggest an approach to the problem which, we believe, merits consideration. Subject to the qualifications noted in the next paragraph, it seems to me to be proper for the United States to permit itself to be joined as a party defendant, with a right of removal (as is now provided in the bill) to the Federal district court, wherever,

(1) in the course of a judicial proceeding in a State court for a general adjudication of rights to the consumptive use of waters within that State it is made to appear to the court that the United States is a claimant of such right and is a necessary party to the proceeding; that the right is claimed for the direct benefit of persons who, if they were themselves the claimants, would be subject to the laws of that State with respect to the appropriation, use, or distribution of water; and that the right claimed by the United States exists solely by virtue of the laws of the State and is required, by a statute of the United States, to be established by an officer or employee thereof in accordance with said laws or has been or is being acquired by the United States from a predecessor in interest whose right depends upon its having been so established; or

(2) judicial review is sought, as provided by State law, by a person adversely affected by and a party to a State administrative proceeding relating to the appro-

priation, use, or distribution of water invoked by a duly authorized officer or employee of the United States upon the outcome of which a right of the United States depends.

The qualifications spoken of above which should, I believe, be attached to such a waiver of immunity are these: (a) The waiver should in all instances be limited to an adjudication of those rights of the United States which depend solely upon their having been acquired pursuant to State law and should not extend to those that exist independently of such law or to those which have existed for a stated number of years (say, 6 years); (b) it should be limited to those claims which are made to appear with particularity in the papers upon the basis of which the court is moved to make the United States a party; (c) it should not extend to the granting of equitable relief against the United States or to the entering of a judgment for costs against it; (d) the United States should not in any way be prejudiced in the adjudication by the existence of a prior decree granted in any adjudication to which it was not lawfully made a party; (e) the waiver should not extend to rights asserted by the United States for or on behalf of Indians.

The Bureau of the Budget has advised that there is no objection to the submission of this report to your committee.

Sincerely yours,

MASTIN G. WHITE,
Acting Assistant Secretary of the Interior.

AUGUST 24, 1951.

Re S. 18.
HON. PAT MCCARRAN,
Chairman, Committee on the Jidiciary,
United States Senate.

DEAR SENATOR: I am in agreement with the general pur-

poses of S. 18. However, there is one possible implication in the bill that has caused me some apprehension and I take this means of achieving clarification before final action by our committee occurs.

It appears to me that section 1 of the bill—although I am sure that is not the intent—might make it possible to block or delay a multiple-purpose development, such as proposed for the Hells Canyon project on the Snake River in the Columbia Basin.

I visualize the possibility of an individual or group, having water rights on that stream, bringing suit to adjudicate their respective rights—thereby preventing the Bureau of Reclamation from going ahead with the Hells Canyon project while litigation is in process or pending. Such action on the part of appropriators might be taken on their own initiative or might be stimulated by third parties who have been opposing this development.

A similar set of circumstances might prevail with respect to other streams in the Basin. I will appreciate the benefit of your best judgment as to whether S. 18 could be used in the manner I have described. I think clarification on this point will be extremely useful if made a part of the legislative history of this bill.

I have another suggestion I respectfully submit for consideration of the committee. From all I can gather, there is no central place in the entire administrative branch of the Government where a catalog of water rights, to which the several agencies lay claim, has been assembled or is maintained. It appears to me it would be extremely helpful to the Attorney General to have access to an up-to-date list of the water rights he may be called upon to protect.

Accordingly, I am attaching a suggested new section for the bill and commend it to you for consideration before final action on S. 18 is taken.

Kindest personal regards.

Sincerely,

WARREN G. MAGNUSON, U.S.S.

AUGUST 25, 1951.

Hon. WARREN G. MAGNUSON,
United States Senate, Washington, D. C.

MY DEAR SENATOR MAGNUSON: I was very pleased to receive your letter of August 24, 1951, relative to S. 18, which provides for the joining of the United States in suits involving water rights where the United States has acquired or is in the process of acquiring water rights on a stream and is a necessary party to the suit.

I note that you raise the question that it might be possible to block or delay a multiple-purpose development, such as proposed for the Hells Canyon project on the Snake River in the Columbia Basin. You indicate that you visualize the possibility of an individual or group, having water rights on that stream, bringing suit to adjudicate their respective rights thereby preventing the Bureau of Reclamation from going ahead with the Hells Canyon project while litigation is in process or pending.

S. 18 is not intended to be used for the purpose of obstructing the project of which you speak or any similar project and it is not intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value. I agree with you that for purposes of legislative history, the report should show that S. 18 is not intended to be used for the purpose of obstructing or delaying Bureau of Reclamation

projects for the good of the public and water users by the method of which you speak and in that connection I propose that such a statement be incorporated in the report and that this exchange of letters be attached thereto.

You further suggest an amendment to the bill relative to the cataloging of water rights to which the several agencies of the Government lay claim and with this suggestion I am heartily in accord. I believe that such an amendment should be presented to the committee for its incorporation into S. 18.

I trust that the foregoing has served to clarify the situation as to your doubts.

Kindest personal regards.

Sincerely,

PAT MCCARRAN, *Chairman.*

G-1

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

IN RE THE GENERAL ADJUDICATION OF ALL RIGHT TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE	W-1 Salt, W-2 Verde, W-3 Upper Gila and W-4 San Pedro
	ORDER

The motions to dismiss filed by the United States and the San Carlos and Tonto Apache Tribes having been set for March 1, 1982, and having come on for hearing at that date, and it appearing to the Court that the United States Circuit Court of Appeals for the Ninth Circuit ruled on February 22, 1982, in the following cases, *San Carlos Apache Tribe of Arizona v. State of Arizona*, 80-5137, 80-5138, 80-5189, 80-5219; *Northern Cheyenne Tribe v. Adsit*, 79-3887; and *Navajo Nation v. State of Arizona*, 80-5471, 80-5837, that the Arizona Enabling Act and Constitution prevented the State of Arizona from exercising jurisdiction over Indian tribes, and the Court having been further informed that relief from these rulings will be sought before the United States Supreme Court,

IT IS HEREBY ORDERED:

1. The motions of the United States and the San Carlos and Tonto Apache Tribes to dismiss are held in abeyance pending a final determination by the United States Supreme Court of the *San Carlos Apache Tribe of Arizona v. State of Arizona*, 80-5137, 80-5138, 80-5189, 80-5219 and *Navajo Nation v. State of Arizona*, 80-5471, 80-5837.

2. Until such time as whatever action the United States Supreme Court takes is final, the United States and the San Carlos and Tonto Apache Tribes and any other party to these consolidated matters shall not be required to file any statement of claimants or other pleadings with this Court. This order is not intended nor does it allow the filing of statement of claimants by any other persons who have not filed statements of claimants in these proceedings by the dates previously set in any of the above-consolidated matters for the filing of statement of claimants. No date having previously expired for the filing of statement of claimants is reopened or extended by this order.

3. If final action by the United States Supreme Court determines that the State of Arizona may exercise jurisdiction in these consolidated matters the motions to dismiss by the United States, the San Carlos and Tonto Apache Tribes will be set for hearing at a time convenient on this Court's calendar approximately 30 days after the final decision by the United States Supreme Court.

4. This order is not intended nor does it determine or affect the rights of any parties in the above-consolidated cases. During the time that the motions of the United States and the San Carlos and Tonto Apache Tribes are held in abeyance all proceedings in these consolidated matters which have occurred prior to this order will be preserved, and the Department of Water Resources may continue to investigate, gather, prepare and process information but may not do so respecting any claim or potential claim of the United States on behalf of any Indian tribe until resolution of the cases cited above in this matter.

DONE IN OPEN COURT this 24th day of March, 1982.

/s/ STANLEY Z. GOODFARB
Judge of the Superior Court

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF APACHE

IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE LITTLE COLORADO RIVER AND SOURCE	No. 6417 ORDER

The Court having considered the Motion by Babbitt Ranches, Inc., et al., to hold the above-entitled proceedings in abeyance and having considered the memorandum of points and authorities and the opinion of the U.S. Court of Appeals for the Ninth Circuit in *Navajo Nation v. United States* attached thereto and good cause appearing,

IT IS THEREFORE ORDERED that all further proceedings in this adjudication including the requirement for filing statements of claimant and the time limit therefore are hereby suspended until further order of the Court pending a final resolution by the United States Supreme Court of the jurisdictional issues raised by the opinion in *Navajo Nation v. United States.*

DONE IN OPEN COURT THIS 25th day of March, 1982.

/s/ J. THOMAS BROOKS
J. THOMAS BROOKS
Judge of the Superior Court